SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1967

No. 1306

WILLIAM F. SCANLAN,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
a corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

		Page
I.	Preliminary statement and statement of references herein	2
II.	Statement as to jurisdiction	4
III.	Statement of the case	5
	A. Relationship and dealings of the parties	5
	B. The industry and economic background	9
IV.	The District Court and the Court of Appeals were without jurisdiction of the state generated claims, except to remand and direct a remand, respectively, upon petitioner's motion for such relief	13
V.	The purported motion for a directed verdict did not invoke the jurisdiction of the trial court	17
VI.	The judgment proposed by the Court of Appeals is clearly erroneous in disregarding the adequate factual support for a plaintiff's verdict upon each of petitioner's causes of action	21
	A. The record fully sustains a petitioner's verdict upon petitioner's first and fourth causes of action, asserting antitrust claims under state and federal statutes, and it was clear error to take these claims from the jury	22
	B. The record demonstrates a complete factual showing of conspiratorial undertaking and damaging acts of unfair competition by respondents, as claimed in the third cause of action, as actionable under state law	35
	C. The proposed judgment results from, and constitutes clear error as related to the contract claim (second cause of action, CT 10:23-14:11)	44
VII.	The proposed opinion of the Court of Appeals misconceives and misstates material facts	51
VIII.	Submission upon petitioner's request that a writ of certiorari issue to the Court of Appeals	55

Table of Authorities Cited

Cases	Pages
Ace Beer Distributors, Inc. v. Kohn Inc., 318 F.2d 283, 375 U.S. 922	53
American Loan Corp. v. California Commercial Corp., 211 C.A.2d 515, 27 Cal.Rptr. 243	41
Anheuser-Busch, Inc. v. Jefferson Distributing Co., 353 F.2d 956	52
Atlantic Heel Co., Inc. v. Allied Heel Co., Inc., 284 F.2d 879	29
Bancroft-Whitney Co. v. Glen, 64 C.2d 327, 49 Cal.Rptr. 825, 411 P.2d 921	15, 39
Bard v. Kent, 19 C.2d 449, 122 P.2d 8	52
Black v. Magnolia, 365 U.S. 24, 2 L.ed.2d 5, 106 S.Ct. 106	34
Brazier v. Cherry, 188 F.Supp. 817, 293 F.2d 401, 368 U.S. 921, 82 S.Ct. 243, 7 L.ed.2d 136	16
Burgermeister Brewing Corp. v. Bowman, 227 C.A.2d 274, 38 Cal.Rptr. 597	5, 49
Burke v. Ford, 368 U.S. ....., 19 L.ed. 554 (December 11, 1967, No. 632)	26
Buxbom v. Smith, 23 C.2d 535, 145 P.2d 305	29, 39, 40, 42
Carey v. Kraft-Phenix Cheese Corp., 24 C.A.2d 517, 75 P.2d 540	5, 40, 50
Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449 (1966, CA 9) affirmed 386 U.S. 37, 19 L.ed.2d 621	3, 17, 55
City of Indianapolis v. Chase Nat. Bank, 314 U.S. 63, 62 S.Ct. 15, 86 L.ed. 47	16
Collins v. Vickter Manor, Inc., 47 C.2d 874	15
Community Counselling Service Inc. v. Robert Benedict Reilly, 317 F.2d 239	41
Falstaff Beer, Inc. v. C.I.R., 322 F.2d 744 (1963)	5, 40
Girardi v. Gates Rubber, etc., Inc., 325 F.2d 196	24
Walter J. Haggerty Jr. v. Burkey Mills, Inc., 211 F.Supp. 835	41
Hancock Oil Co. v. McClellan, 135 C.A.2d 667, 288 P.2d 39	52
Handyspot Co. v. Buegeleisen, 128 C.A.2d 191, 274 P.2d 938	5, 39

Pages

Imperial Ice Co. v. Rossier, 18 C.2d 33, 112 P.2d 631 40
Inland Rubber Corp. v. Triple A Tire Service, Inc., et al., 210 F.Supp. 880 41

Kelly-Springfield Tire Co. v. Bobo, 4 F.2d 71 50
Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705 55
Kold Kist v. Amalgamated Meat Cutters, 99 C.A.2d 191, 221 P.2d 724 25

Macken v. Martinez, 214 C.A.2d 784, 29 Cal.Rptr. 867 41
Main Street etc. Co. v. L.A. Trac. Co., 129 C. 301, 61 P. 937 52
Mangini v. Wolfschmidt, Ltd., 192 C.A.2d 64, 13 Cal.Rptr. 503 50
J. C. Millett Co. v. Park & Tilford, etc., Corporation, 123 F. Supp. 484 46

People v. Santa Clara, etc., Assoc., 238 C.A.2d 225, 47 Cal. Rptr. 570 23
Perryton Wholesale, Inc. v. Pioneer Distributing Co., etc., 353 F.2d 618 29

Roehm Distributing Co. v. Burgermeister Brewing Co., 196 C.A.2d 678, 17 Cal.Rptr. 881 52

Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051 ..... 5, 33, 35, 51, 55
Speegle v. Board of Fire Underwriters, 29 C.2d 34 ..5, 23, 25, 29
Standard Oil Co. v. Perkins, 347 F.2d 379 53
Strawbridge v. Curtis, 7 U.S. 267, 2 L.ed. 435 16

Tunkl v. Regents of University of California, 60 C.2d 92, 32 Cal.Rptr. 33 52

U.S. v. Arnold Schwinn & Co., ... U.S. ....., 18 L.ed.2d 1249 35
United States v. Jos. Schlitz Brewing Company (USDC N.D. Cal. S.D.), 253 F.Supp. 129 (1966) affirmed, 386 U.S. 37, 17 L.ed.2d 35 ..... 10, 30, 34
United States v. McKesson & Robbins, 351 U.S. 303, 100 L.ed. 1209, 76 S.Ct. 937 33
U.S. v. Wise, 370 U.S. 405, 8 L.ed.2d 590, 82 S.Ct. 1354 ... 15

Pages

Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 25
Whitted v. Williams, 226 C.A.2d 52, 37 Cal.Rptr. 692..... 42
Wise v. Southern Pacific Co., 223 C.A.2d 50, 35 Cal.Rptr. 652 .....15, 39, 40

Codes

Business and Professions Code:
Section 14100 6
Section 14102 6
Section 16720 14
Section 16755 14
Section 16900 et seq. 33

Civil Code:
Section 655 ..... 5, 6

Constitutions

Constitution of the United States:
Article III, Section 2 16
Seventh Amendment 2
Fourteenth Amendment 2

Rules

Federal Rules of Civil Procedure:
Rule 38(a) 2, 17
Rule 50 .....17, 56

Statutes

Maguire Act (66 Stat. 632, 15 U.S.C. 45) 33

Sherman and Clayton Acts (15 U.S.C. 1, et seq.).....4, 21, 22, 23
20 Stats. 209 4
38 Stats. 730 4
49 Stats. 209 4

28 United States Code:
Section 1257 4
Section 1291 4
Section 1332 ..... 4, 16
Section 1337 4

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Petitioner, William F. Scanlan, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment entered in the above entitled cause (Appendix 3).

I. PRELIMINARY STATEMENT AND STATEMENT OF REFERENCES HEREIN.

Petitioner is a citizen of the United States and of the State of California therein and petitions for review of the judgments of the Court of Appeals and of the District Court under review therein, upon the grounds that the respective judgments of said courts, should they become final, would deprive petitioner of a trial by jury as reserved to him by the Seventh Article of Amendment to the Constitution of the United States and Rule 38 (a), Rules of Civil Procedure, and would deny petitioner due process of law and equal protection of the law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States, and upon the further ground that said courts were and are without jurisdiction of the subject matter and of the parties to said action, excepting only in respect to the fourth cause of action upon antitrust claims arising under the laws of the United States in interstate commerce.

The judgment below is upon an appeal from a judgment of dismissal upon an order directing a defendants' verdict in a cause removed from the state court upon diversity grounds in an action by a wholesale beer distributor as against a brewer and others setting forth three cause of action (1) combination and acts in restraint of competition in violation of state statute and common law, (2) breach of distributor's contract by the brewer and (3) conspiratorial interference with plaintiff's contract and business relationships. Following removal of the cause to the District Court, a fourth cause of action invoking fed-

eral antitrust laws in respect to the facts of the first cause of action was added to the complaint.

The underlying order directed a verdict in favor of the corporate defendant as to all four of plaintiff's causes of action and, as to the defendant natural persons—as to the third (interference) cause of action, only—but did not direct verdicts in favor of the latter defendants as to the respective antitrust claims in which they were charged. However, the judgment has ordered dismissal of the entire cause as to all claims and defendant parties.

The motion for a directed verdict of the jury was joined with a motion to dismiss the case, in respect to equitable issues reserved for resolution by the trial court.

These motions (Appendix 4) did not state any ground of motion, nor advance any claim to any technical or specific defect in plaintiff's case in chief and the order granting the motion (Appendix 5) is also without specification of any kind (compare *Case-Swayne Co. v. Sunkist Growers, Inc.*, 386 U.S. ....., 19 L.ed.2d 621, 369 F.2d 449, 452-453).

References herein are generally as follows: to pleadings and filings in the clerk's record in the trial court as indicated in Volume I of the transcript of record, herein abbrievated as CT (with zeroes omitted in page references); to the reporter's transcript of oral proceedings (Volume II of the transcript of record, consisting of five volumes, continuously paginated 1 to 1250), as RT; to exhibits as PX and DX; to the State of California, as the

state; to the Business and Professions Code of the state, as the code; to the acts of the Congress relating to competition (20 Stats. 209; 38 Stats. 730; 49 Stats. 209, all as amended, 15 U.S.C. 1, et seq.) as the Sherman Act and Clayton Act; to the parties as petitioner and respondents, respectively; and to respondent Anheuser-Busch, Inc., sometimes as the brewery.

Unless otherwise indicated, emphasis, insertions and omissions in quotations herein are supplied by counsel.

II. STATEMENT AS TO JURISDICTION.

Jurisdiction of the court is invoked under section 1257 of title 28 of the United States Code and that of the District Court was asserted under 28 U.S.C. 1332 upon diversity of residence, although petitioner is a resident of the state and respondent natural persons are also residents of the state[1] (CT 2:6-29).

In respect of the fourth cause of action of the complaint, invoking the Sherman and Clayton Acts (15 U.S.C. 1, et seq.), jurisdiction of the trial court was invoked as to the cause of action under 15 U.S.C. 4 and 28 U.S.C. 1337.

Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1291.

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[1]Petitioner timely moved to remand (Appendix 6) for the reason that defendant natural persons were residents of the state and were independently liable under the first and third causes of action, which motion was denied (CT 601, 8-9-63).

III. STATEMENT OF THE CASE.

A. Relationship and Dealings of the Parties.

During May-September of 1961, petitioner and the brewery negotiated an oral agreement by the terms of which petitioner became the exclusive wholesale distributor of the beer products of the brewery within the County of San Joaquin of the state, a valid and binding contract under state law (*Burgermeister Brewing Corp. v. Bowman,* 227 C.A. 2d 274, 38 Cal. Rptr. 597). These beers were trademarked and known as Budweiser and Michelob. By reason of said agreement and its performance, petitioner became the owner of the good will in said trademark products and their purchase and resale (*Carey v. Kraft-Phenix Cheese Corp.,* 24 C.A.2d 517, 75 P.2d 540). Petitioner was at all times an independent contractor, independently licensed and purchased said beer for resale to his own account (*Simpson v. Union Oil Company of California,* 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051; *Speegle v. Board of Fire Underwriters,* 29 C.2d 34).

As a part of this agreement, petitioner purchased the business and certain physical properties of a partnership of the brothers Barosso, who had acted as the exclusive distributor of said brands of beer for the brewery in said county for many years, and employed the Barossos and certain of their employees as his employees. The making of this agreement transferred to petitioner the business, good will, and customer relations of said Barossos (*Falstaff Beer, Inc. v. C. I. R.,* 322 F.2d 744; *Handyspot Co. v. Buegeleisen,* 128 C.A.2d 191, 274 P.2d 938; Section 655 of the

Civil Code of the State of California; and Sections 14100, 14102 of the Business and Professions Code of the state).

At that time petitioner had for some years been such exclusive distributor in said county of the beer of a competitor of the brewery sold under the brand name of Hamm's.

In 1961, the brewery produced and sold a beer under the brand name of Busch Bavarian—but did not produce or sell this beer in California. As a condition to the agreement for petitioner's undertaking the distributorship of the brewery's beer, its negotiating officer represented that the brewery had no plans to introduce Busch Bavarian in petitioner's exclusive territory.

It is admitted that petitioner carried out his distributorship function and all his undertakings with a high degree of fidelity, efficiency and success to the brewery.

In 1963, the brewery determined to introduce its Busch Bavarian beer in California and in petitioner's area of operations therein. The distribution of the latter brand was offered to petitioner—but only on the condition he cease to purchase and resell Hamm's beer or set up a separate organization, warehouse, sales and service organization under his name and personal supervision and that he disassociate his name and principal participation from his existing distribution of Hamm's beer (Appendix 7).

Upon petitioner's declining to agree to either of such alternative conditions, the brewery agreed with

a partnership known as D. Dinubilo and Sons, an inactive but licensed beer distributor in said county, and the senior of said Barassos, to appoint said partnership as the exclusive distributor in said county for all its brands of beer and to refrain from continuing supplies of Budweiser and Michelob beers to petitioner.

Upon reaching the latter agreement, the brewery refused further supplies of beer to petitioner, said Barosso left petitioner's employment and became the active and principal sales representative of said partnership. At said time Barosso was a principal sales representative of petitioner and was in charge of petitioner's sales activities in the sale of so-called draft beer. The brewery's representatives and said Barosso solicited other of petitioner's important and trusted employees to leave his employment and join said partnership and Barosso in the distribution of the brewery's beers, but without success.

Immediately following the brewery's refusal to further supply petitioner with Budweiser and Michelob beers, the members of said partnership and Barosso, directly assisted by respondents, and the brewery's sales representatives, commenced to solicit petitioner's customers with whom said Barosso had dealt as petitioner's sales representative to secure them as customers for beer for the "new distributor" and to "switch" petitioner's customers for Hamm's beer to the brewery's beers in their current and future purchases of beer.

In addition to the conspiracy established in respect to respondents Anheuser-Busch, Inc., Flanigan, El-

liott, Newhouse, Barosso and Dinubilo, respondent Flanigan testified that he, acting on behalf of respondent Anheuser-Busch, Inc., made an agreement with Theo Hamm Brewing Company for the "switching" of Anheuser-Busch distributors of the respective brewers and of distributors' territories throughout California (see Abstract of Testimony, John Flanigan, Appendix 8).

It is admitted that Anheuser-Busch's Busch Bavarian beer was and is "in competition with Hamm's beer . . . being offered for sale in San Joaquin County" and

> ". . . Plaintiff and defendant Anheuser-Busch Brewing Company did not reach an agreement in respect to distribution of Busch Bavarian beer by plaintiff in San Joaquin County, on or before April 9, 1963, or at any other time. . . . On or about April 9, 1963, defendant Anheuser-Busch informed plaintiff that it would no longer sell Budweiser beer and Michelob beer to him for resale in San Joaquin County after May 1, 1963. . . . Commencing on or about May 1, 1963, defendant Anheuser-Busch commenced selling Budweiser beer, Michelob beer and Busch Bavarian beer to D. Dinubilo & Sons, a licensed beer wholesaler in San Joaquin County and ceased selling to plaintiff. Fred Barosso, formerly of Barosso Beverage Company and more recently employed by Scanlan Distributing Company, left the employment of Scanlan Distributing Company on or about April 12, 1963, and shortly thereafter became an employee of D. Dinubilo & Sons." (Pretrial Order, Facts Agreed Upon or Admitted, CT 426:1-8).

Petitioner commenced his action in the state court alleging such conduct (1) as violation of state anti-trust laws, (2) as a repudiation of his agreement with the brewery and (3) as unlawful acts of unfair competition to his injury—seeking damages and injunctive relief.

Upon service of process the served defendants, respondents herein, caused the removal of the cause to the District Court and petitioner moved to remand the cause on the ground of non-diversity of citizenship (Appendix 6).

Following removal, respondent restated his anti-trust claim as violative of the acts of the Congress relating to restraint of competition and re-noticed his motion for a preliminary injunction, which was denied.

Respondents moved for summary judgment, which was denied (Appendix 12).

The trial proceeded before the trial court sitting with jury and, upon submission of petitioner's case in chief (omitting detailed proof of damages by stipulation and order), respondents moved for a directed verdict upon all issues tried to the jury—joined with a motion for dismissal, in respect to the equitable issues (Appendix 4)—which motions were granted and the judgment of dismissal based thereon was entered (Appendix 5).

B. The Industry and Economic Background.

The business and economic background of this cause involves the wholesale distribution of beer to

licensed retailers in the state for resale to the consumers, with particular reference to the County of San Joaquin therein where petitioner principally operated and maintained his principal place of business in Stockton, California—the county seat of said county.

Respondent Anheuser-Busch, Inc. is a so-called "national" brewer and has maintained the largest volume of production and sale of beer in the United States and, in the relevant years, enjoyed sales in California of 6.8, 1961, 7.1, 1962, and 12, 1963, percent, respectively; and, among California brewers, was of the rank, in said years, of 7th in 1961 and 1962 and 4th in 1963.

We are indebted to the subsequently decided case of *United States v. Jos. Schlitz Brewing Company,* (USDC N.D. Cal. S.D. 253 F.Supp. 129, March 24, 1966, affirmed by the Court, 386 U.S. 37, 17 L.ed.2d 35), for a succinct analysis and summary of industry background, line of commerce, relevant market, relative positions in production and standing of breweries, distribution methods and other facts of judicial notice to which reference is made in lieu of restatement.

As summarized by the latter court, there have been at all relevant times, and will continue unabated, intense competition and trend toward concentration in the sale of beer in California.

California is recognized in the industry as a separate submarket for the production and sale of beer

and accounted, in 1963, for eight percent of the consumption of beer in the United States.

Beer is a separate and unique product, a line of commerce, all brands and types compete with each other in price, image, point of sale advertising, media advertising, shelf space, floor display, refrigerator position and in attention from wholesalers and retailers. Beer is a unique and separate product regardless of price.

That brewer (Schlitz)—to improve its position—was required (in 1961) to introduce its own "popular priced brand" or acquire a going brand and, having acquired such "popular priced brand", sought to require its wholesale distributors to carry all of its brands.

Beer is marketed through specialized vendors who are referred to as wholesalers and distributors.

The changes in that defendant's distributor organization, after such acquisition, resulted in a substantial lessening of competition and evinced a tendency to create a monopoly in the production and sale of beer in California, particularly in that such changes caused substantial detriment to other brewers whose beers were formerly sold by such wholesalers and their distributor organizations were disrupted.

Compare the report of testimony in Distribution Problems Affecting Small Business, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate (89th Congress, Second Session, pursuant to Senate

Resolution 191, Part 2, January 18-27, 1966, pages 510-537), partially quoted as follows:

"The future promises a continued and accelerated trend toward concentration in the brewing industry, with fewer brewers and fewer wholesalers . . ."

* * *

"By 1970, . . . The number of wholesalers will decline during the same period to a level between 3,500 and 4,000.

"Unless significant counterdevelopments occur, it is likely that within the next ten years, the same degree of concentration will exist in the brewing industry as in the auto industry, with three or four giant manufacturers controlling the industry . . ." (pages 511-512).

* * *

"The more powerful a brewer becomes, the greater is his ability to insist that a wholesaler carry only his brands and even to require him to drop a competitive brand or refrain from carrying other products such as wines, liquor, or soft drinks.

"This practice, which according to our surveys is widespread, tends to have the following adverse effects: . . .

"(b) Brewers, even major ones, are unable to obtain distribution for their brands; thus their growth is prevented or retarded . . . ."

"This type of restraint is not contained in a written contract between brewers and wholesalers. . . . it is common for the supplier to 'suggest' that a wholesaler either drop a competitive brand or refrain from taking on another

brand. If the suggestion is not accepted, termination of the distributor may follow, at least, that implication is often conveyed to some brewery representatives."

* * *

". . . Ironically, some of the brewers enforcing a policy of exclusive distribution are finding their positions deteriorating steadily because their distributors cannot survive by marketing only their brands.

"In summary, under present conditions, it is possible for a few brewers who can support a network of exclusive wholesalers, to choke their competitiors to economic death simply by controlling the brands handled by their wholesalers and through other means associated with this technique." (page 515).

* * *

The admissions of respondents and the evidence received, and offered and rejected, are further detailed in relation to points of argument in support of this petition.

IV. THE DISTRICT COURT AND THE COURT OF APPEALS WERE WITHOUT JURISDICTION OF THE STATE GENERATED CLAIMS, EXCEPT TO REMAND AND DIRECT A REMAND, RESPECTIVELY, UPON PETITIONER'S MOTION FOR SUCH RELIEF.

Petitioner complained in his first cause of action: ". . . As a direct and proximate result of *defendants'* wrongful conduct as aforesaid, plaintiff has been injured and damaged . . . that *defendants'* wrongful conduct as aforesaid in restraint of trade and competition in the circumstances herein

alleged has *invoked* appropriate provisions of *the statutes of the State of California* entitling plaintiff to recovery . . . ." (CT 22:32; 23:15-20).

The prayer of petitioner's complaint sought relief, in part, as follows:

". . . A. Upon each cause of action for the recovery in damages in the sum of $185,000.00, and such further damages as shall be proved at trial of and *from each of defendants* respectively charged therein; . . .

* * *

E. Upon plaintiff's First and Third Causes of Action, the additional relief, namely: for an order and judgment trebling the damages *herein found and assessed* . . . with section 16750 of the Business and Professions Code; . . ." (CT 31:8-11; 32:7-11).

Defendants were identified as including the five named and appearing natural persons, respondents herein, and the complaint "complains of defendants, and *each* of them . . .".

The sections of the Business and Professions Code referred to particularly included sections 16720 and 16755 (Appendix 11); the latter of which reads, in part:

". . . Any violation of this chapter is a conspiracy against trade, and *any person who engages in any such conspiracy or takes part therein,* or aids or advises in its commission, or who as principal, *manager, director, agent, servant or employee,* or in any other capacity, *knowingly carries out* any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out

such purposes, or orders thereunder or in pursuance thereof, *is punishable* . . . ."

Compare

U. S. v. Wise, 370 U.S. 405, 8 L.ed.2d 590, 82 S.Ct. 1354.

It is, therefore, indisputable that each of the natural persons appearing as parties defendant was properly charged as a participant in the state antitrust claims and conspiracy alleged in the first cause of action (CT 14:23).

The second cause of action (CT 23:27) alleges a conspiratorial interference with petitioner's contract and customer relations, an independent cause of action under state common law, and all participating persons were liable thereunder (*Collins v. Vickter Manor, Inc.,* 47 C.2d 874, 833; *Bancroft-Whitney Co. v. Glen,* 64 C.2d 327, 49 Cal.Rptr. 825, 411 P.2d 921; and *Wise v. Southern Pacific Co.,* 223 C.A.2d 50, 35 Cal. Rptr. 652).

It is admitted that this cause of action stated a claim and specifically charged each of the five appearing natural parties defendant thereunder and it is also admitted that said parties have been—at all times—California citizens, residents and domiciliaries.

The jurisdictional question was called to the attention of the Court of Appeals, including particular reference in the Petition for Rehearing before that court in part:

"Thirdly, the trial court did not obtain jurisdiction of the cause—except the fourth cause of

> action—because defendants Flanigan, Elliott, et al., are natural persons and California residents, as is appellant, and appellant timely moved to remand after removal of the cause from the state court."

Section 2, Article III, of the Constitution of the United States confers jurisdiction over non-federal, private, civil causes and subject matter only "between citizens of different states".

Section 1332 of Title 28, U.S. Code implements the constitutional provision to provide that ". . . the District Court shall have original jurisdiction over all civil actions . . ." between ". . . citizens of different states . . .". It is the uniform rule of decision that the constitutional provision and the acts of Congress must be construed to invoke jurisdiction of the federal courts of such causes only where all the parties on one side of the controversy are citizens of states different from those of residence of all parties on the other side (*Strawbridge v. Curtis,* 7 U.S. 267, 2 L.ed. 435; *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. 63, 62 S.Ct. 15, 86 L.ed. 47; and *Brazier v. Cherry,* 188 F.Supp. 817, 293 F.2d 401, 368 U.S. 921, 82 S.Ct. 243, 7 L.ed.2d 136).

It is manifest that the removal of this cause from the state court was without jurisdiction and petitioner's timely motion for remand was required to be granted by the District Court and to be directed by the Court of Appeals—hence all proceedings subsequent to petitioner's motion for remand were void, excepting only as to the federal antitrust claims

(Appendix 12) asserted in the fourth cause of action, filed after the denial of said motion (Appendix 6 and Pretrial Order CT 423:15-16, and CT 426:27-427:2; and Amendment to Complaint CT 572:21-27).

V. THE PURPORTED MOTION FOR A DIRECTED VERDICT DID NOT INVOKE THE JURISDICTION OF THE TRIAL COURT.

Rule 38(a), Rules of Civil Procedure, provides that—

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate"

and Rule 50 further provides that—

> *"A motion for a directed verdict shall state the specific grounds therefor."*

The latter requirement modified the rule of decision in some of the circuits and the rule is to be enforced as written.

See the recent case of

Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 452 (November 21, 1966, Ninth Circuit, affirmed in this respect 386 U.S. 37), stating the rule, namely:

> ". . . In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. 'On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom

> the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify. . . . This is true even though contrary inferences might reasonably be drawn.' . . .".

It is respectfully submitted that it can only be fairly said that the trial court and Court of Appeals did not apply these accepted principles to the resolution of this motion for a directed verdict—either in spirit or in detail—rather appeared to feel some unarticulated compulsion to grant the motion, in spite of acceptable evidence upon every element of fact material to the support of a verdict upon each of petitioner's causes of action to have been noted in the reported precedents.

It is only fair to say, further, that references to the record and the argument on the motion were examined by the trial court as though addressed to the burden of persuasion—rather than to the question whether the record would support a finding of a jury upon the particular subject matter of the relevant reserved issues and the rulings actually assumed that the judge presiding was the finder-of-fact (see RT 1114:3-1117:11; 1119:23-1125:23, 1137:4-1140:12; 1143:1-1145:7; 1146:3-1148:24; 1152:10-1160:9; 1163:13-1174:7; 1176:1-25; 1187:7-12; 1200:21-1203:25; 1213:4-17; 1216:16-1217:22; 1225:17-1226:25; 1241:1-15).

An example (RT 1176:19-25) may be briefly quoted to illustrate, namely:

> "The Court: . . . *If I were sitting there as a juror I wouldn't agree with you,* and I think

> I pretty much indicated this in so far as this first count is concerned and *I don't agree with you*, . . ."

Moreover, the trial court consistently took the position that the burden was on the petitioner, as the plaintiff, to "demonstrate" the various factual elements of his case, as adequately illustrated in the argument (RT 1164:10-1167:25), in relevant part:

> "The Court: . . .
>
> Now the next question I ask you is: *Where do we have any demonstration* that this was done for the unlawful purpose of restraining trade in beer, . . . in other words, to give Mr. Scanlan a franchise for San Joaquin County only?
>
> * * *
>
> The Court: Let's go on from there. I am going to take these one at a time. *Wherein do you demonstrate* at any place that the exclusivity of the contract or franchise allocated to Mr. Scanlon or Mr. Giahos in Stanislaus County was granted for the purpose of unlawfully restraining trade?
>
> Mr. Hutchinson: . . . In other words, the evidence would indicate that they dominated these independent distributors in every way that was feasible to the kind of merchandise we are dealing with, geography and human nature. I mean, they just told each of these people what to do, including demanding what was most hurtful dealings in regard to Busch Bavarian."

The formal order and judgment are as non-specific as was the motion (CT 576-579). The oral rulings (RT 1243-1248) seem more to evince concern over

instructions[2] to the jury, and considerations of resolution of the evidence and matters of credibility (e.g., RT 1044:11-1045:15).

In particular, the express admissions of respondents in pleading and discovery and their express concessions during trial—which virtually removed the principal issues from the case—were disregarded.

Further, full consideration was given purportedly defensive matter, admittedly not "in our case" (RT 1144:13-1145:7) and received over objection, for example: the unpleaded, phantom issue sought to be erected upon a letter received and acknowledged by petitioner *after* the making and substantial performance of the distributorship contract, notwithstanding that it was expressly conceded that such letter was not even asserted as a contract, integrated or other (e.g., RT 1213:4-21 and 1223:12-1224:7).

In consequence of respondents' *failure to specify any defect in proof of any reserved issue of fact* and the generality of the trial court rulings, no opportunity to accomplish augmentation, if any were required, in support of any reserved issue was afforded petitioner as the plaintiff in the action. Thus the rulings on the purported motion for a directed verdict constituted clear error.

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[2]For example: it was conceded that, if made, a motion for a directed verdict in favor of petitioner on the third (tortious interference) cause of action would have been granted upon the admitted and conceded facts (RT 1123:22-1125:23).

VI. THE JUDGMENT PROPOSED BY THE COURT OF APPEALS IS CLEARLY ERRONEOUS IN DISREGARDING THE ADEQUATE FACTUAL SUPPORT FOR A PLAINTIFF'S VERDICT UPON EACH OF PETITIONER'S CAUSES OF ACTION.

Assuming jurisdiction of the cause in respect to the state generated claims, the proposed judgment of the Court of Appeals is clearly erroneous in purporting to resolve the evidence, including inferences properly drawn from the testimony and documentary proof, to thereby deprive petitioner of his right to a trial by jury and of due process of law and equal protection of the law, in respect to each of the state generated claims set forth in the original complaint (CT 14:33). The proposed judgment is equally erroneous in respect to the restatement of the facts in petitioner's first cause of action as violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, et seq.) set forth in the amendment and supplement to the complaint after removal.

Further assuming that it might be deemed that there were a lawful and adequate motion to have invoked jurisdiction to direct a verdict was advanced, the judgment proposed by the Court of Appeals constitutes and is based upon clear error. The opinion (Appendix 3) makes explicit the assumption that the Court of Appeals, upon this "motion", was empowered to resolve the evidence as the finder-of-fact in usurpation of the function of the jury; and, secondly, the Court of Appeals, itself, seeks to appropriate the fact finding function of the jury—precisely, in rejecting petitioner's evidence, purporting to consider matters of credibility and adopting evidentiary assumptions

upon purportedly "defensive" matter erroneously intruded in the plaintiff's case in chief (Appendix 3).

These errors are further exposed, in relation to petitioner's respective causes of action, in the discussion following.

A. The Record Fully Sustains a Petitioner's Verdict Upon Petitioner's First and Fourth Causes of Action, Asserting Antitrust Claims Under State and Federal Statutes, and It Was Clear Error to Take These Claims From the Jury.

As indicated, petitioner alleged the basic facts of his antitrust claims under California statute (Appendix 11) and restated them, by reference, under the Sherman and Clayton Acts (15 U.S.C. 1, et seq.) upon removal of the cause (CT 14:27-15:14).

In respect to the state claim, the complaint further set forth verbatim the provisions of section 16727 of the code (Appendix 11).

By answer, respondents admitted the formal allegations of nature and scope of business activities of the parties and admitted that *a wholesale purchaser purchasing the brewery's beers "acquires title thereto"*, the course of dealing alleged, petitioner's course of dealing in Hamm's beer and that *Hamm's and Bavarian beers are accepted as competitive* of each other "to a degree greater than either is competitive with Budweiser and Michelob beers". It was further admitted that intense competition exists between brewers, wholesalers, and retailers of all beers, and that the supply of beers in petitioner's territory exceeds the total public demand, that the introduction of Bavarian beer would increase and intensify competition

between brewers, wholesalers, and retailers of all beers, and that it is contrary to law and public policy for the latter to seek to increase the consumption of beer.

It is undisputed that petitioner and respondents were engaged in both interstate and intrastate business (CT 15:15-18:21) and the transactions disclosed by the pleadings and the evidence are within the legislative jurisdictions of the United States and of the State of California, respectively. It is the holding of the California reviewing courts that California statute and common law may be equated to the Sherman Act, 15 U.S.C. 1, et seq. (*Speegle v. Board of Fire Underwriters, supra,* 29 C.2d 34, 44), and that rulings of the federal courts on matters relating to the Sherman Act are of equal value as interpretive precedents for application of the state statutes (*People v. Santa Clara, etc., Assoc.,* 238 C.A.2d 225, 232, 47 Cal.Rptr. 570).

The pretrial order reserved the issues of petitioner's first and fourth causes of action, as follows:

> "*Issues of Law Presented.*
>
> "(1) Was the termination of dealings between defendant Anheuser-Busch and plaintiff and the refusal of Anheuser-Busch to sell Michelob and Budweiser beers to plaintiff subsequent to May 1, 1963, an unlawful restraint of trade under the State or Federal antitrust laws?"

Petitioner's testimony at the trial included the deposition reference given in the order on summary

judgment (Appendix 12) and reads, in relevant part, as follows:

> "'. . . I told him [Flanagan] that I just absolutely couldn't give up Hamm's; that I would be bankrupt. That I had worked long and hard and done a good job and had the big investment there. I didn't feel it was even fair for him." (RT 345:7-17).
>
> * * *
>
> "John admitted he realized that fact but he also stated *Busch could or would not be under the same roof with Hamm's.* I would either have to go along with them *without Hamm's or attempt to set it up separate.* He insisted that only Bud and Busch would go on the trucks." (RT 346:4-9).

Appellant's evidence below sought, and indubitably sufficed, to invoke the rules of decision of the Court of Appeals in the comparable decision of the Court of Appeals in *Girardi v. Gates Rubber, etc., Inc.*, 325 F.2d 196, 199, 200, to wit:

> ". . . We are unable to perceive any reason why the simplicity and limited scope of the actions alleged to have been taken here would prevent the application of the rule of United States v. Socony-Vacuum Oil Co., quoted supra [310 U.S. 150, 224] . . .
>
> "The situation here is similar to that referred to by the Court in Klor's v. Broadway-Hale Stores, 359 U.S. 207, 213, where, . . . the Court said, 'As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy . . .";

and in the case of *Walker Distributing Company v. Lucky Lager Brewing Co.*, 323 F.2d 1, 7 (Ninth Circuit), referred to in the trial court's ruling upon summary judgment (Appendix 12) which further held, namely:

> "Essentially, what is charged is a conspiracy between Lucky and some of its other distributors, the purpose of which is that none of them shall carry Coors or any other competitive beers. This conspiracy is directed primarily at the makers of those beers, of whom Walker is not one. But if a conspiracy to establish such a boycott of those beers is illegal, as we think it may be, and *if one of its intended and actual effects is to cut off a supply of Lucky's beer to a distributor who does not join the conspiracy, we can see no reason why that distributor does not have a valid claim for relief.*"

The state court rulings are to the same effect: in *Speegle v. Board of Fire Underwriters*, 29 C.2d 34 the state high court held that refusal of the board companies to deal with the plaintiff unless he adhered to their demand that he not sell non-board insurance was actionable as a violation of the antitrust laws of the state.

In the leading case of

> *Kold Kist v. Amalgamated Meat Cutters*, 99 C.A.2d 191, 201, 221 P.2d 724 (Hearing, Supreme Court, denied),

the California rule of decision is further delineated, in revelant part:

> ". . . The courts of this state have held that the letter and paramount object of the law (Cartwright Act) is satisfied if the tendency of the action or proposed action is to restrain trade. . . ."

Prior to the meeting of respondent brewers' representatives, Flanigan and Elliott, with petitioner and with other California distributors of Anheuser-Busch products—Flanigan, in behalf of respondent Anheuser-Busch, and one Newhouse, in behalf of a competing brewer, Theo. Hamm Brewing Company—entered into a compact with respect to the division of territories and substitution of distributors as between said brewers in certain areas of California, particularly including the City and County of San Francisco (Appendix 8). The admissions of respondent Flanigan raise the inference that the compact between these brewers also provided for the switching of brands in petitioner's operations, but petitioner was not apprised of this scheme during the period leading to respondent brewer's refusal to further deal with him.

Compare:

Burke v. Ford, 386 U.S. ....., 19 L.ed. 554 (December 11, 1967, No. 632).

Preliminary to the series of meetings with individual distributors of the brewery's Budweiser and Michelob beers held in San Francisco, California, during the first half of February, 1963, petitioner was advised, during late 1962 and early 1963, by the brewery and its advertising agency that its existing advertising program would be curtailed (RT 186:24-192:18; plaintiff's exhibits G and H). During December 1962,

the brewery wrote "all California wholesalers" (RT 193:19-196:11; plaintiff's exhibit I) and demanded a "build-up" of distributors' inventories "prior to March 1, 1963". The "next change in regular dealings" with petitioner was the urgent demand of the brewery's O'Shanesy, in "early January of 1963" for petitioner's "K.P.A. list" (plaintiff's exhibit J) "similar to your Hamm's evaluation or classification of these accounts", which "key potential account list" as based on petitioner's sales of Hamm's beer was furnished the brewery (RT 196:13-202:13).

The next event was O'Shanesy's request to petitioner that he attend a meeting in San Francisco and to bring with him his "1962 Hamm's sales figures along with my 1962 Budweiser figures", stating the meeting "is in regards to Busch-Bavarian" (RT 205:3-206:23).

On or about February 8, 1963, petitioner attended the pre-arranged conference with the brewery's Flanigan and Elliott at a San Francisco hotel (RT 206:24-207:23).

The purpose of the meeting was announced and included statements of the participants as indicated (RT 209:1-216:20) as follows:

> "... [Flanigan]: ... 'we are coming with Busch Bavarian ... you can see our position that all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. *Some of these breweries are getting pretty weak and some of them won't survive ... Now, we're coming with this program and we ex-*

pect all of our wholesalers to give up something . . . We realize because we are a premium priced beer up till now that *we are in with every brand of beer* listed *on this chart or in the State of California, and coming with this we are going to upset the whole beer business* because we are in with some brand in almost every wholesalership in the State of California.'

* * *

"I [petitioner] told them it was an impossible situation for me to even consider dropping a brand of beer like Hamm's, that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

* * *

"They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.

* * *

"Then Mr. Elliott told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are,* and if we build a new building or if you build a new building and our products are in there *we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.'"*

* * *

The admitted and conceded facts of repudiation of petitioner's contract with the brewery, when designed

to enable the brewery and associated parties to unfairly compete, is independently actionable as unfair competition *(Buxbom v. Smith,* 23 C.2d 525, 545, 547-548). The conspiratorial interference and acts detailed in respect to the unfair competition claims (subpart B of this part VI, *infra)* are acts of unfair competition *eo nomine.* It is the consistent holding of the reviewing courts that such conduct, in and of itself, constitutes actionable violation of the antitrust laws *(Perryton Wholesale, Inc. v. Pioneer Distributing Co., etc.,* 353 F.2d 618, 621-622, and *Atlantic Heel Co., Inc. v. Allied Heel Co., Inc.,* 284 F.2d 879, 884, and cases cited).

In addition, respondents' answer to petitioner's first and fourth causes of action includes the following admissions of ultimate fact:

> ". . . that Anheuser-Busch endeavored to find a suitable wholesale distributor in the Stockton area to distribute Busch Bavarian beer alone at wholesale, *that the* only suitable wholesale *distributor* Anheuser-Busch was able to find in the Stockton area for Busch Bavarian beer *refused to distribute said beer at wholesale unless Anheuser-Busch also sold said distributor its Budweiser and Michelob beers for wholesale distribution as well, and that Anheuser-Busch . . . did, cease selling its beer products to plaintiff, . . .".*
>
> (Defendants' answer, 4:11-23)

There is no problem of tracing petitioner's injuries to the overt acts of respondents and their co-conspirators *(Speegle, supra,* 29 C.2d 34, 40-42, 51)—inasmuch as he was deprived of an established business in Bud-

weiser and Michelob beers in his exclusive territory, otherwise to have continued into the future. While the detail of damages was expressly reserved by approved stipulation, petitioner testified that he was injured by termination of annual sales in the amount of $289,000 gross proceeds of sales, from which he had received a profit ". . . in round figures . . . over cost of purchases and freight and everything else . . . in excess of $50,000" (during the last normal full year, 1962, RT 281:12-17).

Upon receiving unsympathetic consideration of his "simple case," as projected by the ruling on respondents' motion for summary judgment, the admitted facts, pleadings and pretrial conference order, petitioner "fleshed out" his showing "to cover all the bases" and proceeded to the supererogatory task of establishing a full state, or government, case (*United States v. Schlitz,* supra, 253 F.Supp. 129), affirmed 386 U.S. 37, 17 L.ed.2d 35) and introduced admissions of defendants establishing a scramble of distributor relationships in the state of greater scope than that found in the government case in the same area of litigation and during the same period of time in *Schlitz* (RT 1009:11-1031:23). Twelve of the brewery's distributors were required to "drop" another brand—Falstaff, Regal, Lucky Lager, Burgie, Hamm's, and Fisher—and nineteen "new distributors" were established (in *Schlitz,* the court found that the acquisition of Burgermeister resulted in only thirty-one distributor changes in the state (253 F.Supp. 129, 141)).

In respect to a major market, San Francisco, respondent Flanigan testified that two Hamm-Budweiser

distributors in that city were "switched" so that a former distributor of both brands became an exclusive Hamm's distributor and the other became an exclusive distributor for the brewery (Budweiser, Michelob and Busch-Bavarian) throughout the city (RT 1025:8-1026:21).

In addition to dislocation of Hamm's distributors, petitioner further established the interference with other brewers' distribution systems. For example, in the immediately adjoining county and merchandising area, Pete Giahos testified that his firm was required by this brewery to give up the distribution of Falstaff beer and to take in substitution the Bavarian product. He had attended the February meeting in San Francisco and had subsequent discussions with the brewery representative, George Newhouse, as related by this witness, in part, as follows:

> "Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*"
>
> * * *
>
> "Q. And which brand was it?
> A. *Falstaff.*"
> (RT 444:9-447:15)
>
> * * *
>
> "I remember quite well, because Mr. Elliott and I had discussed the fact that I hadn't made a decision of what I was going to do and he said to me, 'Peter, it is getting close to April 15th. You better make up your mind what you are going to do.'

"And I told him, 'You are making it very difficult for me, and I can't quite make up my mind and *I would like to keep my house in order.*'

Q. Did he respond to that statement?

A. Yes, he did. *He told me that inasmuch as time was nearing to the kick-off date of April 15th that if I didn't make up my mind he would have to look elsewhere.*"

* * *

"Q. About what date, if there was any date, was the purchase of Falstaff to cease, immediately or at some future time?

A. We terminated effective the last day of March. As I recall it was on a Friday."

(RT 515-523.)

Although approximately one year later the Giahos firm was "permitted to resume" distribution of Falstaff, the volume sold in its territory had fallen off fifty percent and more.

It is without any dispute whatever that the brewery required of all of its distributors, in the state and elsewhere, to sign the letter-postscript purporting to create "an arrangement not amounting to a contract" which would reserve to the brewery the claimed right, first, to terminate the course of dealing at any time without cause and without notice, and, secondly, would, upon such termination, require the distributor to transfer his inventory to the brewery "or its newly designated wholesalers . . . at the original cost of acquisition."

Since the brewery not only required the ceremony of signature to the letter-postscript by all purchasers

of its products at wholesale for resale, but vigorously enforced its claimed privileges thereunder, it is clear that this scheme is the equivalent of the "short term lease-consignment arrangement" held actionable as a restrictive device in the case of *Simpson v. Union Oil, etc.* (377 U.S. 13, 12 L.ed. 2d 98, 84 S.Ct. 1051) as an arrangement by which "dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive" (377 U.S. 21).

Herein the evidence satisfactorily establishes, *inter alia,* that the brewery fixed its prices of sale to the distributors, the distributor's prices of sale to the retailer, and the retailer's prices of sale to the consumer.

Although the code (sections 16900, et seq.) authorizes resale price maintenance agreements (which might otherwise be immune under the Maguire Act (66 Stat. 632, 15 USC 45)), the record is devoid of reference to any resale price maintenance agreement of any kind.

Moreover, the brewery has always operated "branches" (RT 1028:15-1029:9) in direct competition with its purchasers at wholesale at the same level of merchandising *(United States v. McKesson & Robbins,* 351 U.S. 303, 312, 100 L.ed. 1209, 76 S.Ct. 937).

Petitioner fully proved all that could be required of a private litigant to sustain a case under the state and federal statutes conferring upon private litigants the right to recover for injuries sustained by activity

in violation of such statutes—and, further, has established what would suffice for a state, or government case. *(Schlitz,* 253 F. Supp. 129, 141-143 and 149.)

Rather, the record permits only the conclusion that the brewery planned its campaign and utilized and attempted to use its existing distributorships as expendable shock troops in the guerilla warfare waged to destroy its competitors, i.e.: "some of them will not survive"—not to lawfully merchandise its Bavarian product.

All the demands of this brewery were bottomed upon the existing matrix of restrictive devices and practices,[3] e.g.: price fixing, territorial limitations, limitation upon customer selection, proscription of retail "split-accounts", etc., already imposed and specifically enforced by the implicit and explicit threats to cut off supplies, "to look elsewhere" asserted "as its right" under the post-negotiation, no-term, non-contract "policy" to the patent destruction of the business of the individual distributor.

It is manifest the Court would not tolerate—much less approve and enforce—this scheme, as the judgment of the Court of Appeals certainly would do.

The ruling and judgment taking appellant's anti-trust claims from the jury are without support and

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[3]The tie-in of the Bavarian beer to the established Budweiser and Michelob beers was independently wrongful—even without the exclusion of competing brands (see *Black v. Magnolia,* 365 U.S. 24, 2 L.ed.2d 5, 106 S.Ct. 106). The testimony of petitioner, Giahos, Orsolini (Appendices 7, 9 and 10), leaves no doubt of the tie-in of "all three" brands as a condition to the purchase of any of them.

the judgment should be reversed with appropriate directions. Since all that is required to sustain a plaintiff's verdict is contained in the admissions of respondents and established by evidence received directly from respondents, it appears that such directions should include a requirement that the trial court direct a verdict on the issues of liability upon petitioner's antitrust claims and to proceed to trial of the issues of petitioner's damages *(Simpson v. Union Oil Co., etc.,* supra, 377 U.S. 13, 24).

Compare:

U.S. v. Arnold Schwinn & Co., ... U.S. ....., 18 L.ed. 2d 1249.

B. The Record Demonstrates a Complete Factual Showing of Conspiratorial Undertaking and Damaging Acts of Unfair Competition by Respondents, as Claimed in the Third Cause of Action, as Actionable Under State Law.

The express admissions and concessions and the evidence present a classic, a classroom, example of actionable unfair competition under California common law: Barosso was a managerial and specially trusted employee of petitioner, a specialist in draft beer sales and promotion—the then currently "heated" element of the warfare among brewers in petitioner's exclusive territory, because the limitation of space for tapping facilities limited such sales to retailers to 1-3 brands of beer on tap and resulted in the exclusion of competitors' beers from, and thus tended to monopoly in the purchases of beer by, retailers (Pretrial Order, CT 424-426, admitted facts, paragraphs 4, 5, 9, 10, and 12).

Secondly, Barosso, with his brother Steve, had sold their beer distribution business (Budweiser and Michelob) of many years duration to petitioner in 1961 and the Barossos and their employees accepted employment of petitioner, all as a part of the three-way deal of that partnership, the brewery and petitioner, occasioned by Barossos' lack of capital and success, the brewery's desire to keep its two brands of beer "on the street" and to provide "a peaceful transition of the line" upon petitioner's undertaking to accept the exclusive distributorship, expand his warehouse, purchase additional trucks and tap beer equipment, employ additional men and do the many things required to create and maintain a "competitive" distributorship for the brewery's two then available beers.

All went well until the brewery decided to introduce its third brand beer into the state and petitioner's exclusive distribution territory and demanded that each of its distributors "give up something" to assist the brewery in its competition with all other brewers selling beer therein. The brewery's demand, as related to petitioner, meant that petitioner must "give up" his distribution of Hamm's beer. When petitioner refused to comply with this requirement of the brewery and also declined the alternative requirement that he disassociate his personal name and connection with his existing Hamm's distributorship and duplicate his warehouses, equipment, etc., etc., for the brewery's beers—the brewery went searching for a "new distributor" in petitioner's place.

Barosso, while still an employee of petitioner (RT 565:21-570:15; 590:20-602:8) and the brewery's Newhouse met, talked with the brewery's Elliott and they then met or talked by telephone with the Dinubilos, licensed to engage but inactive in beer distribution, and an agreement was reached that Barosso and the Dinubilos would become the brewery's "new distributor" and would have exclusive distribution of all three of the brewery's beers within petitioner's territory—to the exclusion of petitioner and to the destruction of his business in the distribution of Budweiser and Michelob by the tie-in of the latter beers to sales of Bavarian beer. As a part and condition of this scheme, the brewery agreed to terminate and did terminate its supplies of beer to petitioner.

Barosso and the brewery's salesmen forthwith proceeded to aggressively and systematically solicit petitioner's established customers, particularly draft beer purchasers, to "switch" such customers to the "new distributor"—in competition with petitioner, to the exclusion of petitioner—and to the brewery's beers, to the exclusion of Hamm's beers, and Barosso has so continued in behalf of the brewery ever since (RT 556:4-561:8; 565:21-575:17; 590:20-620:16).

On the latter subject matter, Barosso was explicit (RT 604:19-622:16; 635:11-18), in part:

* * *

"Q. Did you understand when you sold your business to Mr. Scanlan that he was to have whatever good will or whatever you had in relationship with these accounts?

A. That is right, and they stayed with Budweiser beer."

(RT 609:2-6)

* * *

"Q. Very well. Now, *you did systematically solicit the business for your new people Anheuser-Busch products utilizing whatever contacts you had, whatever personal acquaintance you had, knowledge of Mr. Scanlan's business in doing so; is that right?*

A. *Yes. Competition.*

Q. You called on everybody that you had called on before; is that right?

A. *On all of them, every account, not only the Hamm's account, all of them.*

Q. That is all of the accounts that could buy beer, draft beer?

A. Yes, beer.

Q. Now, you continued—withdraw that. *You had served primarily as a draft beer salesman and I guess Manager of that department for Mr. Scanlan; is that right?*

A. *Yes.*

Q. *Did you continue in a similar capacity when the new venture was set up?*

A. *Yes,* more or less."

(RT 618:21-619:15)

* * *

Barosso, in behalf of himself and the new distributor, also solicited other of appellant's employees to switch to them (RT 623:17-625:18; 633:12-23).

Barosso further testified that the exclusion of petitioner from further purchase of the brewery's beers

was because he and Dinubilo demanded "all three" and the brewery agreed (RT 628:23-629:14) namely:

> "Q. Did you ever make inquiry before you made these other arrangements that resulted in talks with Mr. Dinubilo and with Mr. Newhouse on the 8th, as I recall; didn't you make inquiry about what was going to happen to Mr. Scanlan?
>
> A. *Yes, yes, I said, 'We got to have the three labels.'*"
>
> (RT 628:23-629:14)

Barosso's solicitation was successful (RT 636:20-637:3).

There can be no reasonable doubt that respondents' express admissions and Barosso's own testimony establish a claim for damages suffered upon respondents' conspiratorial raid upon petitioner's employees and customers.

Such switching of an entrusted employee to the new employer is unfair competition by the new employer and those participating *(Bancroft-Whitney Co. v. Glen,* 64 C.2d 327-332, 49 Cal.Rptr. 825, 411 P.2d 921) particularly when accompanied by a breach of contract *(Buxbom v. Smith,* 23 C.2d 535, 547-548, 145 P.2d 305) and the breaching and inducing parties are all liable *(Wise v. Southern Pacific Co.,* 223 C.A.2d 50, 35 Cal. Rptr. 652).

The California law is clear that—on Barosso's own testimony—Barosso as the seller of his business was not free to attempt to recapture his customers to petitioner's disadvantage. See *Handyspot Co. v. Buegeleisen,* 128 C.A.2d 191, 195, 274 P.2d 938, holding as follows:

> *"A sale of the property and the business* to which a good will adheres *transfers the good will to the vendee, although not specifically mentioned in the contract of sale."*
>
> * * *
>
> *"The seller of good will,* even in the absence of restricted covenant not to compete, *will not be permitted to destroy the value of the good will by canvassing directly with his old customers* endeavoring to dissuade them from dealing with the purchaser of the good will, and *soliciting them to trade with the seller."*

The privilege of lawful competition does not justify such conduct *(Imperial Ice Co. v. Rossier,* 18 C.2d 33, 36, 112 P.2d 631, and *Buxbom v. Smith, supra,* 23 C.2d 535) and the contracting party and all who participate with him are equally liable *(Wise v. Southern Pacific Co., supra,* 223 C.A.2d 50, 35 Cal.Rptr. 652, hearing denied). Further, the good will—even as related to trademarked articles of other persons—is clearly saleable *(Carey v. Kraft-Phenix Cheese Corp., supra,* 24 C.A.2d 517).

Specifically, petitioner's purchase of the Barossos' business carried with it an undertaking to refrain from competing with petitioner.

See, *Falstaff Beer, Inc. v. C. I. R.,* 322 F.2d 744, 747-748 (1963), in part:

> "The sale of good will carries an implicit agreement to refrain from competing or interfering with the market [citations].
>
> * * *
>
> ". . . As the Louisiana court held in Mouton v. Hebert, *it is unfair and tantamount to fraud, to*

sell a business with one hand and attempt to recapture its fruit with the other."

* * *

"Coupled with Heusinger's sale of his beer inventory and the delivery of his organization to Monfrey, *Heusinger disqualified himself from competing with a different beer,* but the same drivers (salesmen) and customers. . . ."

See, also,

Macken v. Martinez, 214 C.A.2d 784, 788-789, 29 Cal.Rptr. 867.

As petitioner's employee, Barosso was, of course, bound to the utmost good faith toward plaintiff and certainly violated these obligations by dealing with the brewery, Newhouse and the Dinubilos.

See the cases of:

Walter J. Haggerty Jr. v. Burkey Mills, Inc., 211 F.Supp. 835, 837;

Community Counselling Service Inc. v. Robert Benedict Reilly, 317 F.2d 239;

Inland Rubber Corp. v. Triple A. Tire Service, Inc., et al., 210 F.Supp. 880;

and authorities cited.

The California cases declare an employee or former employee may not appropriate his employer's business in this fashion. A recent case, *American Loan Corp. v. California Commercial Corp.,* 211 C.A.2d 515, 521, 522-525, 27 Cal.Rptr. 243, states the general rule as follows:

"'. . . A list of subscribers of a service, built up by ingenuity, time, labor and expense of the

owner over a period of many years is property of the employer, a part of the good will of his business and, in some instances, his entire business. *Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee as his own property or to his employer's prejudice.'"*

In the most recent case of

Whitted v. Williams, 226 C.A.2d 52, 56, 57, 37 Cal.Rptr. 692,

the Court further details the controlling rules of decision, in relevant part:

"A customer list may exist in the memory of the employee as well as in writing. *(George v. Burdusis, supra,* 21 Cal.2d 153, 160.) . . .

* * *

"The special finding that the names, businesses, and addresses of those *customers were not secret is of no consequence in view of the confidential nature of other information acquired by this defendant in the course of his employment as a delivery route employee. . . . The use of that status to the detriment of his former employer was unfair.* . . . The evidence also shows that *the information he acquired with respect to the buying habits of those customers, their needs, and the methods of fulfilling those needs, which was basic to the operation of a profitable business, was a trade secret within the principles of law heretofore noted."*

See the closely parallel case of

Buxbom v. Smith, supra, 23 C.2d 535, 547-548,

declaring the applicable rules of decision as follows:

". . . Here the record shows that the *defendants gained an unfair advantage over the plaintiff through deceptive dealings in the form of a contractual agreement* whereby they deliberately induced the plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then noncompeting business and then, having acquired through their employment *agreement with the plaintiff, complete knowledge of his business methods and records, they undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise. . . .*"

* * *

". . . A breach of contract is a wrong and in itself actionable. *It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above.* It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. (See Prosser, Torts, p. 1023, et seq.; Rest. Torts, sec. 768)."

It is respectfully submitted that the ruling directing verdict and judgment of dismissal as proposed to be affirmed by the judgment of the Court of Appeal, as related to petitioner's unfair competition claim, is clear error and that the judgment should be reversed with directions to the District Court (1) to direct a verdict upon the admitted and undisputed facts as against all appearing defendants on plaintiff's second cause of action, upon all issues of liability, and (2) to

proceed to the trial of the issues of damages and accounting under this cause of action.

C. The Proposed Judgment Results from, and Constitutes Clear Error As Related to the Contract Claim (Second Cause of Action, CT 10:23-14:11).

The admissions and evidence support a verdict in favor of petitioner upon the contract alleged in his second cause of action in accordance with the law of the state.

The brewery's answer to the contract cause of action posed no affirmative defensive matter and placed in issue material allegations by general denials, only, except for the certain factual matters which were expressly admitted, the principal of which is as follows:

> ". . . plaintiff purchased certain assets of the wholesale distributor previously engaged in distribution of Anheuser-Busch beers in the Stockton area, employed Fred Barosso and Steven Barosso, enlarged plaintiff's warehouse building, constructed a walk-in box on plaintiff's business premises and made other improvements therein . . ."

The pretrial order (CT 427:3-7) reserved the issues of law related to the second, contract, cause of action as follows:

> "(2) Was there an oral contract between plaintiff and defendant Anheuser-Busch by the terms of which Anheuser-Busch was obliged to continue selling its Budweiser and Michelob beers to

plaintiff and, if such contract is found, was it breached by said defendant?"

The termination of performance of the contract by the brewery, as stated to the jury in respondents' opening statement (RT 89:16-90:1) occurred as follows, namely:

> "*Mr. Elliott, acting on the authority conferred* on him by his superiors, called Mr. Scanlan and *said, 'We found a new distributor, Dinubilo & Sons. They will take the products provided they can have all of them.' And I think he said, 'We find it regrettable to have to terminate you in these circumstances, Bill.'* Mr. Scanlan said, 'What's the termination date going to be?' Mr. Elliott said, 'You name it.' Mr. Scanlan said, 'You name it.' Mr. Elliott said, 'May 1st.' *And ultimately it came to pass that on May 1st the Dinubilos started out as the new Anheuser-Busch products distributor* including Busch Bavarian in Stockton."

The agreed facts stated in the pretrial order (CT 424:24-425:12 and 426:6-9) as relevant to the contract claim include the following:

> "(4) From 1948 until 1961 Budweiser beer and Michelob beer . . . were distributed in San Joaquin County by . . . Barosso Beverage Company.
>
> "(5) . . . *After further discussions between plaintiff, Barosso and representatives of Anheuser-Busch, plaintiff bought certain assets of Barosso Beverage Company and thereafter plaintiff was appointed and commenced to serve as wholesale distributor of Budweiser and Michelob* on October 1, 1961.

"(6) *From October 1, 1961 to May 1, 1963, plaintiff served as wholesale distributor for* Hamms Beer and for defendant's Budweiser and Michelob beers. . . .

* * *

"(9) On or about April 9, 1963, defendant *Anheuser-Busch informed plaintiff that it would no longer sell Budweiser beer and Michelob beer to him for resale* in San Joaquin County after May 1, 1963."

It was expressly conceded at trial that plaintiff was the exclusive distributor with the exclusive right of purchase for resale at wholesale of the two identified brands of the brewery's beer in San Joaquin County (RT 20:2-22; 997:6-8) and that petitioner performed every obligation of the agreement[4] he alleged and that he carried out every requirement of the brewery in respect to his distribution functions in a satisfactory manner is also conceded, throughout the record, and without qualification or reservation (e.g.: RT 81:19-24; 167:4-8; 1108:25-1109:5).

Respondents' representations to the trial court on the latter subject include (RT 20:4-22) the following:

---

[4]Incredibly, the brewery contended there was no agreement whatever between it and appellant! See reporter's transcript, at pages 6-37 and 1086-1101, "an effort to demonstrate that a contract did not exist" (RT 328:12-21, *inter alia*), and compare *J. C. Millett Co. v. Park & Tilford, etc., Corporation*, 123 F.Supp. 484, 489, ruling *contra*, in part:

"*The defendant argues* that there was no contract at all. '*There was merely an arrangement not amounting to a contract,* under which plaintiff was given the privilege of distributing Park & Tilford products.' . . ."

"The Court: Under the terms of that relationship *would you have had the right to also use some other distributor?*

Mr. Hanger: *That was an exclusive territory relationship.* I think that you would fairly have to characterize that *only Mr. Scanlan would sell in this territory. . . . We tell him, 'This is your territory, and it is all yours.* You sell "X" cases of beer in this territory and you will make some money.' Apparently he did.

The Court: In return what does Scanlan say?

Mr. Hanger: Scanlan in return, for that matter in all cases, Scanlan has to get himself some trucks; he has to have warehouse space to house the beer; he gets some uniforms for his truck drivers. *There is a list of things* which undoubtedly will go in evidence in this case *which he is required to do,* and if he is not willing to do that, then, we go to Joe Onetta or somebody else, we find ourselves a distributor."

Needless to say, such admissions and concessions resulted from the consistent testimony of all participants in the contract negotiations. Petitioner, Elliott, Leadholm, and Barosso each testified to the concluding conference in the negotiations for the distributorship with an authorized representative of the brewery (Elliott) before, and as a condition to, the purchase of the beer distribution business, good will and physical equipment of the Barossos, their employment by petitioner, petitioner's purchase of trucks, expansion of his warehouse and cooling facilities, and acceptance of the exclusive distributorship for Budweiser and Michelob beers in San Joaquin County.

See petitioner's testimony on this subject matter (RT 126:6-156:23; 163:14-164:6; 289:2-295:25; and 316:5-25, *inter alia*).

A particular representation was that the brewery had no plans for introduction of Busch Bavarian beer in California (RT 151:19-153:9 and 322:21-325:7) to disturb petitioner's operation as contemplated.

The testimony respecting the concluding discussion in this conference (RT 149:12-150:1; 156:12-24; and 1325:17-25) may be partially quoted for convenience, namely:

> "Q. Mr. Scanlan, before the adjournment did Mr. Elliott or anyone else say anything about anything further to be done or discussed in connection with these proposals that had been under discussion that day?
>
> A. Yes, just start preparing myself for becoming the Anheuser-Busch wholesaler in the future.
>
> Q. Now, you did part with that understanding on your part?
>
> A. Yes, I did.
>
> Q. Was there any understanding stated by anyone present of any future meeting on this subject or anything further to be done to complete it?
>
> A. None that I recall." (RT 156:12-24)

It is, therefore, manifest that this jury could have found, reasonably, that petitioner had fully proved the contract he had alleged and, under law, petitioner was entitled to have his contract claims submitted to the jury.

By reason, alone, of the express admissions of (1) petitioner's purchase of the Barosso beer distribution business with the brewery's considered approval, (2) construction of warehouse and cooling unit, purchase of trucking, handling and other equipment as required by the brewery, (3) full and proper performance of his undertakings as a distributor and of all lawful requirements of him by the brewery as such distributor and the further admission that said distributorship was an exclusive distributorship within petitioner's exclusive territory with exclusive right of sale therein, petitioner's right to require continued performance by the brewery and to claim his damages upon the latter's wrongful repudiation of further performance on April 9, 1963, was fully proved.

The most recent California case, and one dealing with a beer distributor in similar circumstances, *Burgermeister etc. Corp. v. Bowman, supra,* 227 C.A.2d 274, 280, 38 Cal.Rptr. 597 (hearing denied), in which the Court affirmed the judgment on a plaintiff's verdict, the controlling rules of decision are stated as follows:

> "Assuming, without deciding, that Bowman had not promised to exert his best efforts to sell Burgermeister's beer or to take care of the territory, he had in fact done so for a period of 19 years, had provided a fleet of trucks, painting them with Burgermeister advertising, had contributed to the brewery's advertising fund, had built warehouse facilities and had enlarged his inventory beyond his winter needs, etc. *Such a contract is not merely an executory promise for a promise.* Professor Williston describes such a

contract as '*an exclusive option by which the manufacturer promises to deal through no others within the defined territory . . . so long as the dealer desires to handle his products.* . . . If there is sufficient consideration, *this option is clearly a contract and is so held.*' (4 Williston on Contracts (rev. ed.) § 1027a, p. 2850.) There was sufficient consideration given here."

See, also, the case of *Mangini v. Wolfschmidt, Ltd.*, 192 C.A.2d 64, 13 Cal.Rptr. 503, and the leading case in the Ninth Circuit, applying California substantive law and affirming a plaintiff's recovery, of

Kelly-Springfield Tire Co. v. Bobo, 4 F.2d 71, 73-74.

Under California law, such a distributor is an independent contractor and acquires a property right in the subject matter.

See,

Carey v. Kraft-Phenix Cheese Corp., 24 C.A. 2d 517, 524, 525, 75 P.2d 540.

namely:

"We are therefore of the opinion *the plaintiff in this case was not a mere agent of the defendants, which agency was subject to revocation, but, on the contrary,* it appears that *he held title to a property interest in the business of buying and selling Kraft products,* which he had a right to sell and convey. . . ."

It is thus established by proof—not only sufficient for submission of factual issues to the jury—but also for direction of the jury to find for petitioner on the

issues of liability upon the second, contract, cause of action.

Since all material facts necessary to recovery on the contract are established by express admission and by evidence—from both sides and by testimony of all participants without conflict—it would but stultify the discussion and needlessly expand this submission to further detail the evidence in proof of the instant contract claim and, it is respectfully submitted, the judgment should be reversed in this respect with directions to the District Court to direct a verdict on all issues of liability on the contract issues and to proceed to the trial of the issues of petitioner's damages upon his second cause of action.

See

Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051.

VII. THE PROPOSED OPINION OF THE COURT OF APPEALS MISCONCEIVES AND MISSTATES MATERIAL FACTS.

The opinion (appendix 3) states, at page vi, that petitioner had not purchased the "business or goodwill" of the Barosso partnership. The evidence, as a whole and as noted in subparts B and C of part VI hereof, demonstrates the error of this statement and the issue was clearly a fact issue for the jury.

The opinion (appendix 3) states, at page vi, ". . . Three letters were introduced in which appellant specifically acknowledged, *prior* to his assumption of the Budweiser-Michelob distributorship, that

this would be the relationship between the parties.", whereas the evidence is demonstrative (see part C of part VI hereof) that an agreement was negotiated at the Eden Motor Lodge and petitioner had purchased the Barossos' business, employed the Barossos and their employees, constructed his warehouse and cooling unit and purchased additional trucks, *prior* to receipt of the brewery's letter-postscript device. Secondly, two of the "three letters" were not addressed to respondent brewery, but to respondent Flanigan as an individual and related only to the subject of whether petitioner were in fact buying the "good will" of respondent brewer. The cases cited to the quoted misstatement (*Anheuser-Busch, Inc. v. Jefferson Distributing Co.*, 353 F.2d 956, and *Roehm Distributing Co. v. Burgermeister Brewing Co.*, 196 Cal.App.2d 678, 17 Cal.Rptr. 881), are inapposite inasmuch as *Jefferson* did not suggest that that distributor had ever negotiated an agreement with respondent brewery and was only a job-lot buyer without any continuing relationship or other consideration. Under California law the letter-postscript is illusory, without consideration and without validity as a contractual instrument. See:

Tunkl v. Regents of University of California, 60 C.2d 92, 32 Cal.Rptr. 33;

Bard v. Kent, 19 C.2d 449, 452, 122 P.2d 8;

Main Street etc. Co. v. L. A. Trac. Co., 129 C. 301, 305, 61 P. 937; and

Hancock Oil Co. v. McClellan, 135 C.A.2d 667, 669-70, 288 P.2d 39.

The ruling of the Court of Appeals on the point is directly contrary to the ruling of the same court in *Standard Oil Co. v. Perkins,* 347 F.2d 383-384. In *Roehm* a new contract was negotiated, new consideration given and the contractual instrument constituted a valid contract under state law.

The statement (appendix 3, page vii) that the confidential trade information acquired by the Barossos and transferred to petitioner and that subsequently acquired by Fred Barosso, as an employee of petitioner, "was certainly not confidential information", is contrary to the record and all California precedent (see in particular the references to the record and citation of authorities in subpart B, part VII hereof).

The opinion (appendix 3) states, at page vii, ". . . Thus appellant's loss of Budweiser and Michelob was not due to any *Walker*-type conspiracy to boycott competing beers", whereas the evidence was directly to the contrary, summarized and cited in subpart A of part VI hereof and quoted in controlling respects in abstracts of testimony of petitioner, Flanigan, Orosolini and Giahos (appendices 7, 8, 9 and 10). The case of *Ace Beer Distributors, Inc. v. Kohn Inc.,* 318 F.2d 283, 375 U.S. 922, cited to this latter misstatement on the evidence in this cause is equally inapposite. In *Ace* the judgment was upon the plaintiff's pleading—which contained no allegation of facts indicating any activities violative of the antitrust laws. Further, the *Ace* court particularly noted that that plaintiff's case did advance adequate claims of

breach of contract and unfair competition, as a common law tort, but held that such subject matter was without the jurisdiction of the federal courts under the Sherman and Clayton acts.

The opnion further states (appendix 3, page ix), ". . . There is a complete absence of evidence to establish a general conspiracy to create a 'tying' arrangement between appellee and its distributors", whereas the evidence summarized in subpart A, part VI hereof, supra, and particularly quoted in appendices 7, 8, 9 and 10, supports—if it does not compel—a finding to the contrary, the only causative event in this case was respondent brewer's attempt to tie its third brand to the distribution of its two established brands by the exclusion and discriminatory treatment of all beers "directly competitive" with its third, Busch Bavarian, brand.

It is patent that the fundamental fallacy of the foregoing statements in the proposed opinion and rationale of the Court of Appeals is that the Court of Appeals was, in fact, reviewing the judgment of the District Court as based upon findings of fact derived from the evidence. It is, thus, that the Court of Appeals has erroneously assumed a fact finding function and purported to approve the erroneous assumption of the fact finding function of the jury by the District Court. The factual issues have *not been tried* and remain to be tried to a jury as particularly reserved to petitioner by the Seventh Amendment to the Constitution of the United States,

Rule 38 (a), Federal Rules of Civil Procedure, and relevant acts of Congress.

The opinion (appendix 3, page vii) further states that petitioner "ultimately decided to take no chance . . . on Busch Bavarian . . .", whereas respondents' answer and the admitted facts set forth in the pretrial order, as well as all the testimony, are *explicit that respondents terminated the relationship and course of dealing* between petitioner and respondent brewery.

VIII. SUBMISSION UPON PETITIONER'S REQUEST THAT A WRIT OF CERTIORARI ISSUE TO THE COURT OF APPEALS.

Notwithstanding the supererogatory efforts of the Court to guide the District Courts and the Courts of Appeals in the enforcement of the acts of the Congress proscribing "business" conduct violative of principles of fair competition in business, it appears these lessons have not been learned and this private litigant must seek review of the unsupported and erroneous judgment proposed by the Court of Appeals.

In this regard, it may be noted that recent and controlling rulings in this field of litigation eminated from the Ninth Circuit, namely:

Case-Swayne v. Sunkist Growers, Inc., 369 F.2d 449;

Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L.ed.2d 98;

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705,

in each of which the Court was required to reverse the judgment of the Court of Appeals and correct the underlying judgments of the respective District Courts. Since redress has been herein denied, it is necessary that another injured litigant appeal to the discretion of a busy Court.

Fortunately, the disregard of jurisdiction, statute and rule of decision is here manifest and need not tax the Court with the breaking of new ground.

Except as to the fourth claim invoking Sherman Act principles, the courts below never acquired jurisdiction and the cause, as removed, which was required to be remanded upon petitioner's motion for an order remanding the cause to the state court from which it was erroneously removed.

In all events, the order directing a defendants' verdict was without jurisdiction and void, as unsupported and violative of Rule 50, Rules of Civil Procedure, and proceeded upon the explicit fallacy that the judge presiding was the finder of the facts.

Finally, and assuming jurisdiction, the judgment of the Court of Appeals in proposing to affirm the judgment of dismissal of the District Court is clear error—without evidence and contrary to the admissions and overwhelming proof of each issue of fact necessary to petitioner's recovery upon each of his claims in accordance with relevant and controlling rules of decision.

It is respectfully submitted that justice to this petitioner and public considerations of probity in

judicial administration in the courts of the United States, herein more than usually, impel the granting of review of the erroneous judgment herein proposed by the Court of Appeals.

Dated, San Francisco, California,
April 3, 1968.

Respectfully submitted,
J. ALBERT HUTCHINSON,
Attorney for Petitioner.

(Appendices Follow)

Appendix 1

United States Court of Appeals
For the Ninth Circuit

No. 21,252

William F. Scanlan,
Appellant,
vs.
Anheuser-Busch, Inc., a corporation, et al.,
Appellees.

ORDER STAYING ISSUE OF MANDATE

Upon application of J. Albert Hutchison, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before April 10, 1968. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final dispo-

sition of the case by the Supreme Court of the United States.

We will prepare a certiorari record when directed to do so.

Dated, San Francisco, California,
March 12, 1968.

Charles M. Merrill,
United States Circuit Judge.

Filed March 13, 1968,
Wm. B. Luck, Clerk.

Appendix 2

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, California 94101

March 5, 1968

J. Albert Hutchinson, Esq.
Attorney at Law
55 New Montgomery St.
San Francisco, Calif. 94104

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 21,252—William F. Scanlan vs. Anheuser-Busch, Inc., a Corporation, was this day denied.

Pursuant to Rule 26 and unless by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,
Wm. B. Luck, Clerk.

Appendix 3

United States Court of Appeals
For the Ninth Circuit

No. 21,252

William F. Scanlan,
Appellant,
vs.
Anheuser-Busch, Inc., a corporation, et al.,
Appellees.

[January 11, 1968]

On Appeal from the United States District Court for the Northern District of California, Northern Division

Before: POPE, HAMLEY and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

Appellant has brought suit against appellee alleging breach of a contract of distributorship, unfair competition and violation of state and federal antitrust laws. He appeals from a judgment of dismissal by the District Court following directed verdict. The question before us is whether, upon any of his claims,

an issue remains for the jury. Finding no such issue, we affirm.

Appellee is a brewery with nationwide distribution of its products: Budweiser and Michelob premium beers and Busch Bavarian, a popular-priced beer. Appellant is a beer distributor located in Stockton, California. Prior to 1961 appellee's premium beers were distributed throughout San Joaquin County, California, by Fred Barosso, while appellant was distributor of the popular-priced Hamm's beer. In 1961 Barosso suggested to appellant that the two distributorships be combined. Appellant was not interested in this proposal but did agree to an arrangement whereby he purchased certain of Barosso's assets for $10,000, employed Barosso and took over his distributorship of Budweiser and Michelob.

Prior to 1963 appellee had not entered the highly competitive Pacific Coast market in popular-priced beer. In that year it determined to enter the market with Busch Bavarian. Appellant was offered the San Joaquin County distributorship but declined, feeling that his position as dealer for Hamm's, a competing beer, might thereby be prejudiced. Appellee then sought to find a San Joaquin County dealer for Busch Bavarian, but without success. Apparently the generally accepted view in the industry was that no beer wholesaler in the Stockton area could operate profitably handling Busch Bavarian alone.

Appellee finally found, in Dinubilo & Sons, a liquor dealer interested in a beer distributorship, provided

it could handle the whole Anheuser-Busch line of beers. Appellee thereupon terminated appellant's dealership in Budweiser and Michelob and entered into a dealership arrangement with Dinubilo & Sons. Barosso left appellant's employ and took employment with Dinubilo & Sons.

Appellant's first contention is that appellee's action in terminating his dealership of Budweiser and Michelob was a breach of an oral contract that his dealership was terminable only for cause. There was no evidence of such a contract. The evidence, on the contrary, was clearly to the effect that appellee would deal with appellant only on the basis of a buyer-seller relationship, order-to-order, terminable at the will of either party. Three letters were introduced in which appellant specifically acknowledged prior to his assumption of the Budweiser-Michelob distributorship, that this would be the relationship between the parties. No issue remained for the jury respecting this contention. See *Anheuser-Busch, Inc. v. Jefferson Distributing Co.*, 353 F.2d 956 (5th Cir. 1955); *Roehm Distributing Co. v. Burgermeister Brewing Co.*, 196 Cal.App.2d 678, 16 Cal.Rptr 881 (1961).

Appellant next contends that appellee engaged in unfair competition in soliciting Barosso away from him and utilizing his knowledge of appellant's customers.

Appellee's first contact with Barosso was initiated by Barosso himself. He had been serving the territory for distributors of Anheuser-Busch products for over 20 years. He had not sold his business or goodwill to

appellant (only certain business assets), and had not made any covenant not to compete. He induced no other employees to leave appellant's firm. The identity and requirements of San Joaquin County beer retailers was certainly not confidential information but was available to anyone. See *American Loan Corp. v. California Commercial Corp.,* 211 Cal.App. 2d 515, 27 Cal.Rptr. 243 (1963). There simply are no facts upon which to base a claim of unfair competition in this respect.

Since this claim fails, it provides no basis for appellant's claim that there was a conspiracy between the brewer, Barosso, and Dinubilo & Sons to drive appellant out of business that violated § 1 of the Sherman Act. Nor would such a conspiracy to substitute one distributor for another, even if proven, violate the antitrust laws. See *Perryton Wholesale, Inc. v. Pioneer Distributing Co.,* 353 F.2d 618, 622 (10th Cir. 1965), *cert. denied,* 383 U.S. 945 (1966).

Finally, appellant contends that in two other respects the termination of his Budweiser-Michelob dealership volated antitrust laws. First he contends that his dealership was terminated because of his refusal to cease handling Hamm's, and that this action was taken pursuant to a conspiracy between appellee and certain of its Pacific Coast distributors, in violation of §1 of the Sherman Act, 15 U.S.C. §1, to eliminate wholesale outlets for competing popular-priced beers and leave a clear field for Busch Bavarian. He relies upon *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963).

The District Court determined that there was no evidence that appellee sought to have appellant abandon his dealership of Hamm's, but that the evidence was quite to the contrary. We agree. From appellant's own testimony it appears that appellee had stated that appellant would not be expected to give up distribution of Hamm's; that the expressed attitude of Hamm's was that it would neither approve nor disapprove of appellant's handling of Busch Bavarian and that the decision would have to be appellant's; that appellant ultimately decided to take no chance on losing Hamm's and that to take on Busch Bavarian would constitute an undue risk to his Hamm's distributorship.

Thus, appellant's loss of Budweiser and Michelob was not due to any *Walker*-type conspiracy to boycott competing beers. This case rather is comparable to *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir.) cert. denied, 375 U.S. 922 (1963), which makes it clear that a mere unilateral change of distributors by a brewer, having no effect on the availability of competing products, does not violate the Sherman Act. *Cf. United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Second, appellant contends that appellee violated §1 of the Sherman Act and §3 of the Clayton Act, 15 U.S.C. §14, by refusing to make Budweiser and Michelob available to wholesale outlets unless the latter also distributed Busch Bavarian; that it was unlawfully using the economic power it possessed through control of its premium beers to free its

popular-priced beer from the normal competitive stress of the open market.

There is a complete absence of evidence to establish a general conspiracy to create a "tying" arrangement between appellee and its distributors.

But, further, it is abundantly clear that appellee was not attempting to secure a competitive advantage through tying Busch Bavarian to Budweiser and Michelob in the instant case. It was only through transferring all three brands to another distributor that Busch Bavarian could enter the competitive arena at all in San Joaquin County. As stated in *Brown v. Western Massachusetts Theaters, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961), "the antitrust laws do not require a business to cut its own throat." We may add that they do not require a business to refrain from entering a competitive market. A course of conduct which thus increases rather than diminishes competition, benefiting rather than injuring the public, is not condemned under the Sherman or Clayton Acts.

Affirmed.

Appendix 4

DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

"Mr. Hanger: If the Court please, the Plaintiff having rested his case, we come before this Court again to ask the Court to take the case away from the Jury, and on behalf of all of the Defendants I wish at this time to move for a directed verdict and in so far as there may remain any so-called equitable issues in the case I believe the motion properly should be to dismiss the Complaint so I make the joint motion to the Court at this time on the ground that we are not here now with affidavits. We have had some eight days of testimony, a number of live witnesses, a number of exhibits put in the record, and it is my belief, and I so urge on behalf of all the Defendants, that taking all facts which the Plaintiff has proved in this case, and considering all of the reasonable inferences that one might draw from these facts, it is clear that the Plaintiffs have not proved a cause of action on any of their three stated theories.

Now, at this point, your Honor, I will indicate that in so far as the individual defendants are concerned, as I read the Complaint they are only named in the third cause of action, the one having to do with the so-called unfair competition, and the solicitation of Plaintiff's employees and agents, the first and second and fourth causes of action by the terms of the Complaint are addressed to the Corporate Defendant alone, so that my motion with respect to the individual Defendants pertains to the third cause of action with respect to the corporate defendant, Anheuser-Busch, to all causes of action." (RT 1052:7-1053:8.)

Appendix 5

ABSTRACTS OF ORDER GRANTING MOTIONS FOR DIRECTED VERDICT AND JUDGMENT ON DIRECTED VERDICT.

1. Order Granting Motions for Directed Verdicts.

"This cause came on to be heard on the motions of defendants, and each of them, for a directed verdict, and the Court having heard the argument of counsel and being fully advised, it is hereby

Ordered, the motions of defendant Anheuser-Busch, Inc. for a directed verdict on the first, second, third and fourth causes of action in plaintiff's complaint are granted, and it is further . . ." (CT 576.)

2. Judgment of Dismissal.

"Now, after hearing arguments of the attorneys, the motions for directed verdicts and for dismissal of the complaint were granted, and the Court having ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is ordered by the Court that plaintiff take nothing by these actions, that the complaint be dismissed, . . ." (CT 579.)

Appendix 6

ABSTRACTS OF PETITION FOR REMOVAL AND MOTION FOR ORDER REMANDING CAUSE TO STATE COURT.

1. Petition for Removal.

"4. The complaint also purports to name as *defendants John Flanigan, George Elliott, George Newhouse, George Liokos and Richard O'Shaney, all of whom were at the time of the commencement of said action, at all times thereafter have been and now are, residents of the State of California* and employees of defendant Anheuser-Busch, Inc. *Any thing or act* alleged in the complaint to have been done or omitted by any of said defendants Flanigan, Elliott, Newhouse, Liokos and O'Shaney, if done or omitted at all, *was done or omitted* by said defendants, or any of them, *in the course and scope of their employment with Defendant Anheuser-Busch, Inc.*" (CT 2.)

2. Motions for Order Striking Portions of Petition for Removal and for Order Remanding Cause to Court Where Action Was Commenced.

"William F. Scanlan, plaintiff above-named, moves the above-entitled Court for its order striking from petition for removal on file herein the following portions thereof:

* * *

2. The so-called defendants Flanigan, Elliott, Newhouse, Liokos and O'Shaney are not actual parties but are merely nominal and formal defendants and their purported joinder as defendants is sham and a fraudulent device to impede petitioner's right

of removal and is made in bad faith with no intent on the part of plaintiff to obtain a judgment against anyone but the petitioner. *Said defendants are charged by* the allegations of the complaint, if at all, *only in plaintiff's alleged third cause of action. . . .*

Said motion is based upon the ground that said *quoted portions of said petition are conclusions of law, sham and scandal,* and is further based upon said petition for removal, all the pleadings and papers on file in the cause, upon this motion, notice of hearing, and the statement of reasons and points and authorities appended hereto.

Plaintiff further moves said Court for its order *remanding the above-entitled cause to the Superior Court* of the State of California, in and for the County of San Joaquin, upon each of the grounds provided and set forth in Title 28, Section 1447, United States Code, and particularly in that—

1. *The cause was removed improvidently; and*
2. *The Court is without jurisdiction of the cause.*

Said motion is based upon the petition for removal, all the papers and pleadings on file in the cause, upon this motion, notice of motion, and the statement of reasons and points and authorities appended hereto."

(Certificate of Clerk, item 10.)

Appendix 7

ABSTRACTS OF TESTIMONY OF WILLIAM F. SCANLAN (RT 208-216, 226, 228-229).

"Q. Following the luncheon you did have a particular meeting then with Mr. Elliott and Mr. Flanigan?

A. Yes, yes, I did, at 1:00 o'clock was my scheduled time.

Q. Now, was this in an office or suite of rooms, residential rooms in the hotel?

A. It would be a suite of rooms in the Fairmont Hotel.

Q. Was anyone else present other than the two of you—the two of them and yourself?

A. No, that was all that was there.

Q. Now, omitting the pleasantries and casual remarks, would you give us, as best you recall, the discussion in so far as it related to the business of the brewery and affected you that preceded, indicating if you can, each individual who spoke and the substance of what they had to say?

A. Yes. I was brought into this room and seated and Mr. Flanigan took the floor and told me, 'Bill, you know what this is all about and we are coming with Busch Bavarian.' And I said, 'Fine.' And I sat attentively and listened. He had a chart listing all of the California breweries in their sales or their sales position as far as barrels or gallonages are concerned, showing their position or whether they was in a plus position for the previous year, for 1962, or whether

they was in a down position where each brewery stood in the industry as far as California sales were concerned. He went over this quite thoroughly and pointed out all the weaknesses in some and the strength in one.

* * *

Q. Do you recall how Mr. Flanigan requested your views; do you remember how he put it?

A. Yes, he did. He made the statements, and he said, 'You can see our position that *all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. Some of these breweries are getting pretty weak and some of them won't survive.*'

* * *

Q. Now, was anything further said about your views or your activity, if any, in respect to the introduction of the Busch Bavarian brand in your territory?

A. Yes, he did. He says, 'Now, we're coming with this program and *we expect all of our wholesalers to give up something.*'

Q. This was Mr. Flanigan?

A. Yes, Mr. Flanigan.

Q. Was he more specific in any of his remarks at that time as to what the 'something to be given up' might be?

A. Well, yes. He says that 'We realize because we are a premium priced beer up till now that *we are in with every brand of beer listed on this chart or in the*

State of California, and coming with this *we are going to upset the whole beer business because we are in with some brand in almost every wholesalership in the State of California.'*

Q. Now, in respect to the—in respect to your views as to your territory, were those requested or solicited by either of these gentlemen?

A. Well, my views, or they had some projected figures for the sale of Busch-Bavarian.

Q. In San Joaquin County?

A. Yes, for San Joaquin County.

Q. Do you recall the approximate projection, the amount in cases, or whatever other measure it might be?

A. Yes, I do. They had a projected sales figure of 88,000 cases of Busch Bavarian for that year plus a 45,000 known sales of Budweiser the previous year.

Q. Now, did they ask your views as to the likelihood of attaining that amount of sales or anything of that nature?

A. Yes. I listened to them and told them at that time that their anticipated sales or their projected sales, that there was just no way that any beer wholesaler could make a go of anything like this in the Stockton market. It was—conditions were too hard and too tough and they just didn't have enough boxes or cases slated for a wholesaler to even come close to making it.

Q. Now, in that connection, did you call to their attention or they call to yours, the sale of Hamm's or any other beer being sold in San Joaquin County?

* * *

A. I told them it was an impossible situation for me *to even consider dropping a brand of beer like Hamm's,* that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

Q. What, if anything, was said in response to that statement, if there was any, by either of the other men?

A. Yes. John replied and he said, 'Well, Bill, maybe we got our sights set too high then in this situation. As far as you dropping Hamm's maybe that would be—we couldn't expect you then to do it under these——'

Mr. Hutchinson: He's speaking to the witness.

The Court: Who was it who said that,—Flanigan?

The Witness: This would be John, yet, John talking to me.

The Court: John Flanigan. I am sorry. Go ahead.

* * *

The Witness: Yes. John told me that maybe that their analysis of it was wrong and they couldn't expect me then under those situations—they *knew that no one was going out and commit suicide, financial suicide, that way* and that they, or we better look the situation over a bit closer.

* * *

Q. Now, did anything develop with respect to any arrangements by which *you would attempt to keep Hamm's and also take on Busch Bavarian with the Budweiser and Michelob beers that you were already handling?*

A. No. They told me at that time that they didn't expect an answer right then off me but we discussed the possibilities of different ways to do it.

Q. Now, *was anything said about having a so-called separate operation of some sort?*

A. *Yes, there was.*

* * *

Q. What, if anything, was said about how it would be handled *if it should be carried out, that is, a separate operation;* were you to operate it, or what was the case?

A. *They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.*

Q. What was said, if anything, about associating personally or your name being associated with such a separate operation if it developed?

A. Well, I mentioned the possibility that maybe I could take Fred Barosso over there and make him the manager of the operation and maintain my present facilities and just have the two warehouses side by side.

* * *

Q. What if anything, did he say?

A. He [Elliot] told me that, 'Bill, that wouldn't be a satisfactory arrangement. We have had Fred Barosso and we have had him for years and find that he is a poor business man. He does a good sale on the bars and on the off sale accounts but he is just not capable of running the business. We couldn't go along with that at all.'

Q. Was anything said by either of them about your having to associate and associate your name with such a separate operation if it developed?

A. Yes. Then Mr. Elliot told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are,* and if we build a new building or if you build a new building and our products are in there *we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.'*

Q. Now, in connection with the prospects for Busch Bavarian in San Joaquin County and your part of it, what further was said at this meeting?

A. I reminded Mr. Elliott then, and he was sitting alongside of me, I went back and reminded him of the agreement that I felt was reached in the Eden Motor Lodge when he assured me that they had no plans for Busch Bavarian for California in the immediate future or the near future or the three to five years, or how it was answered.

* * *

Q. What did he state?

A. He just said, 'Bill, things have changed.'"

(RT 208:12-216:20.)

"Q. What, if anything, did Mr. Newhouse respond when you gave him this background and made this final statement?

A. Well, in one of these meetings at that time he made the statement, 'Well, Bill, would you like to get

out the way that you got in?' referring to my buying, buying Barosso out.

Q. Did you respond to that?

A. I said, 'Certainly, but are you authorized to offer this?'

Q. What, if anything did he respond?

A. No, he didn't reply to that.

Q. Now, did you have any further discussion with either of these men in relation to the distribution of Anheuser-Busch products following these discussions?

A. Yes, I did. Mr. Newhouse was in the market quite frequently and he always wanted to know what my plans were. *And I told him that my plans hadn't changed a bit,* that we had discussed the possibility of the building, that I had made some inquiries about this and that but ultimately *I would end up and say, 'George,—'* George Newhouse was the name—*'I am happy and content with the deal or arrangement that we made with Hamm's and Budweiser.* Why don't you go find someone else to carry the Busch Bavarian?' "

(RT 226:3-24.)

"Q. Now, have you related to us, as you now recall, the principal contacts you had with all of the brewery people from the meeting at the Fairmont up until early April around the 9th?

A. Yes.

Q. Now, on April 9th or thereabouts did you receive a call from anyone connected with the brewery?

A. Yes. When I returned to my office there was a return call for me from Mr. Elliott in Van Nuys that I should call him.

* * *

Q. Now, in this call was there any discussion about the *distribution of Anheuser-Busch products?*

A. *Mr. Elliott was apologetic and told me, 'Bill, we have found another wholesaler or somebody that is going to take on the Busch Bavarian line and they want the whole package.'* They was making arrangements to set up a distributorship and he felt real bad *but he was going to have to terminate me* or, in other words, that I had had it.

* * *

Q. Did he indicate when you would be no longer be able to distribute or buy for resale any of these products?

A. Yes. He said, 'Bill, now what is a good cutting off date for you?' Or, *'When can we cut you off?'*

* * *

Q. What did you say?

A. *I told him, 'George, I don't want to give up the line and you know that I don't want to give up the line.* This is your move and you're the one that is setting the date. You pick the time. It isn't my time to pick.'"

(RT 228:8-229:23.)

Appendix 8

ABSTRACTS OF TESTIMONY OF JOHN FLANIGAN (RT 1023-1031).

"Mr. Hutchinson: I think I should read the first one which appears at page 22, your Honor, because this occurred at the meeting with Mr. Scanlan *on the 8th,* as we understand it, of *February, 1963.*

'Q. Now, with respect to Hamm's in the discussion of Hamm's with Mr. Scanlan, *did he not ask you if you had on behalf of Anheuser-Busch discussed any of these rearrangements with the representatives of Hamm's?*

A. He did ask us that.

Q. Do you recall your reply?

A. I don't recall the reply exactly, but we had no definitive answer from Hamm's.'

I think that implies that they had discussed it certainly.

Then on page 29—I think this passage brings it up to the point where we are considering—page 29.

'Q. Was Mr. Scanlan as a result of this meeting of February to make any decision on that at the request of the brewery, namely, to give up or continue with Budweiser and Michlebo?

A. No. *The meeting in February occurred right after Hamm's officials had been to California and had fairly well stated their position, which was in opposition to a position that they took down south with Ace Beverage,* and I felt that although Mr. Fiege had been quite harsh on one of the Hamm's wholesalers while he was here, and this was general knowledge at the convention, I felt that Scanlan's picture was somewhat different, because of the territory, the problems of the territory, and that Mr. Fiege when he got

back to St. Paul would relent in this particular case and perhaps would let Bill work this out as we had discussed. I might point out that Mr. Elliott didn't share my opinion of Mr. Fiege's generosity.

Q. Did Mr. Fiege make whatever statements you are referring to to you?.

A. No.

Q. Were they recorded or reported in public prints?

A. No.

Q. Could you tell us the source of information as to what Mr. Fiege had said on the subject?

A. Walter Markstien.

Q. Markstien?

A. Yes. He was the wholesaler to whom he made them.

Q. *He is presently a distributor for this brewery, Anheuser-Busch?*

A. Yes, in San Francisco.

Q. And he was a year or two prior——

A. *He was a distributor for Hamm's and Budweiser for a number of years prior to that.*

Q. *When the Busch Bavarian situation developed, he ceased to be a distributor for Hamm's; is that right?*

A. *As a fact, yes.* When Busch Bavarian came into the market, he no longer distributed Hamm's.

Q. At the same time, you had another distributor in San Francisco; was it Rossi?

A. Rossi.

Q. And he had been distributing Anheuser-Busch products and what else?

A. Hamm's.

Q. *And as a result of Busch Bavarian, Rossi was terminated as Distributor to Anheuser-Busch products?*

A. *He was.*

Q. *And Markstien then took over the whole city?*

A. *The entire San Francisco City.*

Q. Now, with respect to Rossi, how did the termination of his relations with Anheuser-Busch come about?

A. Well, when it became evident that Markstein was no longer going to be able to keep Hamm's, and *since Rossi was an outgrowth of our original arrangements with Hamm's for distribution in San Francisco, we recognized that the Rossi area would have to be incorporated into the total San Francisco area,* and we therefore did not offer or suggest to Rossi that he take on Busch Bavarian. We told him what we were going to do out of courtesy. But we knew ahead of time that we would have to incorporate the entire matter to make it a reasonably economic situation.

Q. Was Rossi ever given a written notice of termination?

Mr. Hanger: A written notice of *determination.*

Mr. Hutchinson: Excuse me.

Q. Was Rossi ever given a written notice of determination?

A. I don't know.

Q. *Now, you said that you have an arrangement with Markstien and Rossi and Hamm's regarding distribution of Hamm's and Anheuser-Busch products. Do I understand that you had some arrangements with Hamm's at an earlier time on the subject?*

A. Hamm's and ourselves handled this as a brewery branch of the City of San Francisco originally, with the exception of the Rossi terri-

tory, which Hamm's was servicing through Rossi. We were both anxious to discontinue our branches and felt we could—with the dual volume be of interest to the wholesaler.

Q. *Prior to the Busch Bavarian situation, you had had meetings with Hamm's and discussed this business of distributors' territories and the like?*

A. Some years before this.

Q. Did you personally participate in these meetings or discussions?

A. In some of them.

Q. With whom did you talk on behalf of Hamm's?

A. I talked to Herm Newhouse, to Herschback, and, I don't think we talked to—no, I guess we talked to Herb Goodwin from time to time.

* * *

Q. *Now, by "Brewery branch",* I take it you mean that you kept a warehouse or some supply here in some fashion to supply other distributors than Markstein and Rossi; is that right?

A. No. *We operated as a wholesaler, as a—the brewery operated a distributorship as opposed to an independent distributor.*

Q. In other words, Anheuser-Busch actually had a selling operation here in San Francisco?

A. Correct.

Q. And how long did it continue?

A. Well, it continued off and on from about the time we came back into the market—it was an off-again-on-again sort of thing. We would have a wholesaler; then we would have a branch; then we would have a wholesaler, from about 1947 on.

Q. *It is your understanding, is it not, that the brewery could sell direct to retailers at any time anywhere in the State?*

A. *Yes.*

Q. So choosing a distributor was a matter of misjudgment rather than any restriction on the legal capacity of the brewery function?

A. Correct.'

* * *

The Court: Read that again. That seems to be the crux. This is in the February, 1963 area.

Mr. Hutchinson: Yes. I will start re-reading at page 33, line 9, which I think is the point the Court probably has in mind.

'Q. Now, what else with regard to Hamm's? When Rossi and Markstein were to change around, as you have indicated, *was there a further meeting between you and some Hamm's representative?*

A. *I had luncheon with Herm Newhouse* to see if I could determine their feelings on the matter, *since we had a number of Hamm's wholesalers, and since we were actually to—or since the wholesalers themselves were somewhat confused as to the position of Hamm's and where they were going to, what was going to happen, I was hopeful that I would be able to clear the air.* This luncheon was at the Fairmont Hotel and I think about the time of the February 8th meeting.

Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

* * *

I think the other portions sort of carry forward the same ideas, though there may be something more specific."

(RT 1023:14-1031:25.)

Appendix 9

ABSTRACTS OF TESTIMONY OF CHARLES OROSOLINI (RT 542-547).

"Q. *Did Mr. Newhouse make a proposal to you or request you to consider distribution of Busch Bavarian?*

A. *Yes.* He wanted to know whether I was interested to carry Busch Bavarian. And I listened to his sales talk and he told me about his advertising, all that. *Then I finally asked him, I says, 'Well, it's kind of strange,' I says, 'that you are offering me Busch Bavarian. You have a distributor.' He says, 'Well, yes, that is right.' I said, 'Why don't Bill take it? He says, 'Well, Bill won't give up Budweiser.'*

* * *

Q. Who was identified as 'Bill'?

A. Scanlan.

Q. What were the brands of beer that he was distributing at that time?

A. *He was distributing Hamm's and that is the beer that he was going to throw out.*

Q. *Now the statement made by Mr. Newhouse was that they weren't going to give Busch Bavarian to Mr. Scanlan, or Bill, as you identified him?*

A. That is right.

Q. Because he wouldn't give up Budweiser, is that correct?

A. *No, because he wouldn't give up Hamm's.*

Q. Thank you. Now, this was the first meeting. Was there any second or later meeting with Mr. Newhouse?

A. Yes; about two or three days later Mr. George Newhouse came back and he had a representative from Budweiser.

* * *

Q. Now, did you have a conversation on the same general subject as the first one at this meeting?

A. No, the conversation that I had the second time was that he wanted to know *whether I would be willing to put in another barn, and in that way, then, I could have the three products of Budweiser.*"

(RT 542:7-543:24.)

* * *

"Q. Now, was there any suggestion that there might be a separate operation of any kind? Was that ever discussed?

A. That was the discussion that we had, that *they wanted me to set up another barn, a separate organization.*"

(RT 546:2-547:23.)

Appendix 10

ABSTRACTS OF TESTIMONY OF PETE GIAHOS (RT 442, 446, 458, 467, 532, 537, 538).

"Q. Perhaps I can state it a little more simply: In connection with the discussion of the Busch Bavarian merchandising program did either Mr. Flanigan or Mr. Elliott or perhaps someone else present point out to you the relative standing in sales of Lucky Lager, Hamm's and other beers?

Mr. Hutchinson: Q. Do you have the question now?

A. Yes.

Q. Now, at that time were you distributing any beer other than the Anheuser-Busch products, Budweiser and Michelob?

A. Yes.

Mr. Hutchinson: Q. What brands were you distributing?

A. We were handling Budweiser, Michelob, Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali.

Q. Now, other than the Budweiser and Michelob brands, those were manufactured and sold by breweries other than Anheuser-Busch, is that right?

A. Yes."

(RT 442:16-443:1.)

"Q. And if I understand then, Mr. George Newhouse was taking over the territory for them in lieu of Mr. Leadholm; is that correct?

A. I believe that is correct.

Q. Now, will you tell us, as best you remember, what you said and *what Mr. George Newhouse said to you in respect to changes, if any, that would occur or should occur in your distribution of various beers upon the advent of the Busch Bavarian beer distribution?*

Mr. Hanger: Same objection for the record.

The Witness: Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*

By Mr. Hutchinson:

Q. Did he indicate *what competitive brand was to be dropped?*

* * *

A. *Falstaff.*

Q. Was that a beer commonly referred to in the trade as a popular priced beer?

A. Yes, sir.

Q. And was that about all that Mr. Newhouse said at that time or was there something further?

A. Well, actually he was very new with the company at this point, and I think it was very embarrassing to him and I kept telling him that it was also very embarrassing to me, but that I felt that *I would like to keep my distributing company intact physically and I realized that he,* being new with the Anheuser-Busch Company, that he *was apparently attempting to convey to me what his company wanted or expected in our marketing area."*

(RT 446:6-447:15.)

"The Court: Well, Mr. Hanger, let me ask you a question. You don't have to commit yourself on this. But is there any dispute that, first of all, the Bud people said to Scanlan, 'We want you to handle Busch,' and further that because he did not handle Busch they took Bud away from him? *These are admitted facts, aren't they?*

Mr. Hanger: *Well, they took Bud away from him,* not specifically because he didn't handle Busch but for other reasons they couldn't find anybody else to handle it. I think that is an admitted fact.

The Court: Wait a minute. I missed you on that. *I asked you whether they took Bud away from Scanlan because he evidently never got around to giving them an answer as to whether he was going to handle Busch.*

Mr. Hanger: I think they took——

The Court: That is the way I interpret the evidence that has come in so far from him.

Mr. Hanger: *That's right,* they took Bud away from him. Now, I think they would have left Bud with Scanlan if they could have found another suitable distributor for Busch in the San Joaquin County. I think the evidence will reflect, and I think that it has already been testified to by Scanlan, that George Newhouse came to him and asked him who else would take it and he went and talked to all those people.

The Court: Let's concede that—I see your point. *There is certainly testimony to that effect on which a jury could reach that conclusion that they took Bud away from him because they wanted to be sure that*

they'd get a Busch distributor in San Joaquin County; he hadn't made up his mind as to whether he wanted to handle Busch; they couldn't get anybody else to handle Busch, *and evidently the only way they could get anybody to handle Busch was to tie it in with Bud.*

Mr. Hanger: Right. I don't like to use that expression 'Tie it in' but I think——

The Court: That was an unfortunate statement of mine in the presence of Antitrust lawyers. O.K. That they wanted to have the three of them sold together.

Mr. Hanger: The new distributor insisted on taking Bud and Michelob before he'd take Busch, and Mr. Scanlan's own testimony was that he didn't feel you could take that combination of three beers and make a profit of them, which is why he refused to take on Busch.

Mr. Hutchinson: *He wanted to handle them without restrictions. He didn't refuse to take it but——"*

(RT 458:6-459:24.)

"The Court: . . .

So maybe, Mr. Hutchinson, if you could prove a conspiracy in which Anheuser-Busch was involved, along with some other distributors, Dinubilo, we will say that they were going to make Mr. Giahos give up the sale of Falstaff beer and thus diminish or restrain competition that would otherwise be offered by Falstaff beer, then, if I read this portion of the Walker case correctly, if I understand it, *that would constitute a statement of a cause of claim and if it would be proved it would be a violation under Section 1 of the Sherman Act.*

Do you agree with that, Mr. Hanger?

Mr. Hanger: *I agree that if the brewery conspires with other distributors, say, in different territories, in different areas,——*

The Court: All right.

Mr. Hanger: *——To take a particular brand away from another distributor, under Walker the Court says they believe that may constitute a violation of the Sherman Act."*

(RT 467:7-24.)

"By Mr. Hanger:

Q. Mr. Giahos, you said you met with Mr. Flanigan and Mr. Elliott on February 8th or 7th, I believe, is that correct?

A. That is correct.

Q. Now, at that time, as you indicated on your direct examination, you had some five or six additional brands other than the Budweiser brand, correct?

A. That is correct.

Q. Including Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali, correct?

A. That is correct.

Q. *Now, at the February 7th meeting had you been asked to bring your total Falstaff sales for the preceding year?*

A. *Yes.*

* * *

Q. So that at the time of that presentation it was indicated to you on the basis of the projection that *if you substituted Busch Bavarian for Falstaff* you would, in fact, have more sales, is that not true?

A. That was the inference."
(RT 532:14-533:23.)

"Q. I take it then you did not independently determine, as a matter of business judgment, that Busch Bavarian was going to be better than Falstaff immediately?

A. It is very difficult to project that.

Q. *As a matter of fact, you urged, did you not, to both Mr. Elliott and Mr. Newhouse that you be permitted, if you had to give up something,* to give up a brand in which you had a smaller sales, including particularly Regal, is that not true?

A. I was willing at that time to give up a couple of lesser selling items. I don't think Regal was one of them because it wasn't a lesser selling item.

Q. At least lesser quantity?

A. Well, particular reference to items like Mexicali, Bulldog, and the Rainier.

Q. *Now, I think you stated in answer to a question by Mr. Hanger that after the Falstaff product was no longer distributed by you, it lost ground in the market, lost its sales, is that true?*

A. *That is correct."*
(RT 537:3-22.)

* * *

"Q. I see. Now, Mr. Flanigan did finally tell you that Anheuser-Busch would not raise objection if you took on Falstaff line again, is that true?

A. *I was permitted to do business with Falstaff again.*

Q. Now, you have had that line merely a year. Is that long enough to give an estimate as to the present annual sales of Falstaff in your territory?

A. *The present Falstaff sales are less than half of what they were when we gave it up.*

Q. Now, have you been, since you took back the Falstaff line for distribution, carrying out the usual distributor functions to the best of your firm's capacity?

A. In regard to——

Q. Falstaff.

A. Definitely."

(RT 539:7-21.)

Appendix 11

EXCERPTS OF PROVISIONS OF SECTIONS 16700 THROUGH 16757 OF THE BUSINESS AND PROFESSIONS CODE, STATE OF CALIFORNIA, INCLUDING QUOTATIONS FROM SECTIONS 16720, 16727, 16750, 16755, AND 16757.

"§ 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce."

* * *

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

"§ 16727. It shall be unlawful for any person to . . . make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, . . . on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the . . . sellers, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition . . . in any section of the State."

"§ 16750. (a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or where service

may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys fee together with the costs of suit."

"§ 16755. (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who is principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable . . ."

"§ 16757. (a) In prosecutions under this chapter, it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"(b) The character of the trust or combination alleged may be established by proof of its general reputation as such."

Appendix 12

ABSTRACTS FROM MEMORANDUM AND ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

"A brewery and its distributors can form a conspiracy. The plaintiff need not sue all of the conspirators, and he need not allege the names or descriptions of the conspirators not sued (*Walker Distributing Co. v. Lucky Lager Brewing Co.*, supra at page 8). Accordingly, on their face Counts I and IV state a claim upon which relief can be granted." (CT 345).

* * *

"However, other portions of plaintiff's deposition indicate that defendants did refuse to deal with plaintiff unless he would cease dealing with Hamm's.[1] On the whole, the testimony in the materials submitted does not unequivocally refute the assertion that defendants refused to deal with plaintiff for the reasons alleged in the complaint. The Court cannot, therefore, find that there is no genuine issue as to any material fact with respect to Counts I and IV of plaintiff's complaint."

"[1] . . . counsel have agreed, for purposes of this motion, that on page 89 thereof plaintiff stated 'John [Flanigan] admitted he realized that fact [that plaintiff could not afford to give up Hamm's] but he also stated Busch could or would not be under the same roof with Hamm's. I would either have to go along with them without Hamm's or attempt to set it up separate. He insisted that only Bud and Busch would go on the trucks.'(CT 346.)"

SUPREME COURT, U. S.

MAY 6 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1306

WILLIAM F. SCANLAN,
Petitioner,

vs.

ANHEUSER-BUSCH, INC., a corporation, et al.,
Respondents.

Brief in Opposition to Petition for Certiorari

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SUBJECT INDEX

	Page
Preliminary	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Argument	6
Conclusion	7
Appendix I	App. 1
Appendix II	App. 2

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PRELIMINARY

Petitioner has rebound a condensed, but largely verbatim,* version of his 89-page Opening Brief in the Court of Appeals, restyled it as a "Petition For Writ of Certiorari," and filed it with the clerk of this Court. Even affording the petition a most liberal construction it can hardly be

Emphasis is supplied throughout, unless otherwise noted.

*Except for the first paragraph on page 2 and the writing under headings IV (Pet. 13-17) VII and VIII (Pet. 51-57), the balance of the petition is practically a copy of Appellant's Opening Brief in the United States Court of Appeals for the Ninth Circuit.

made to fill the office of a petition for certiorari. It suggests none of the "special and important reasons" for granting a writ to review a decision of a court of appeals which are set forth in Rule 19(1)(b) of Revised Rules of this court. It does not contain, in any order, the matters required to be set forth in Rule 23, subdivisions, 1(a), 1(b)(i), 1(b)(ii), 1(c), 1(d), 1(h) and 1(i). It seems manifest that it fails "to present with *accuracy, brevity* and *clearness* whatever is essential to a ready and adequate understanding of the points requiring consideration" by this Court. In these circumstances, certiorari may be summarily denied pursuant to subdivision 4 of Rule 23. Nonetheless we attempt to reply to the petition on its merits.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. iv-ix) is reported at 388 F.2d 918 and also at 1968 Trade Cases § 72355.

JURISDICTION

Jurisdiction of this Court could be invoked pursuant to 28 U.S.C. 1254(1), but not under 28 U.S.C. 1257 as stated at page 4 of the petition. The judgment of the Court of Appeals was entered January 11, 1968. As the petition was received on April 10, 1968, this brief is timely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No consitutional provisions or statutes have been set out verbatim, with or without official volume and page citations, in the petition. Selected portions of five sections of the California Business and Professions Code are excerpted and set forth in Appendix II to the petition. In addition there are passing references to the Seventh and Four-

teenth Amendments to the United States Constitution at page 2 of the petition and to the Sherman and Clayton Acts "(15 U.S.C. 1 et seq)" at pages 4, 21, 22 and 23.

It is respondent's view that neither the Constitution nor the statutes mentioned in the petition are involved in the case. This is purely and simply a fact case—not a law case. Both of the lower courts have held that petitioner clearly failed to prove a prima facie case on any of his various theories of action.

If it is assumed that the propriety of the order refusing to remand the case to the state court is a question presented to this Court* (Pet. 13-17), then section 1441 of 28 U.S.C. may be involved in the case. The pertinent text is set forth in Appendix I.

QUESTIONS PRESENTED

Although the questions presented are not identified in the petition, we seem to detect two basic questions in the case as follows:

1. Should the case have been remanded to the Superior Court?

2. Did the plaintiff make a case to go to the jury on his fourth cause of action based upon the federal anti-trust laws?

STATEMENT OF THE CASE

This action was commenced in the Superior Court of the State of California. Defendants, claiming diversity of citizenship, in the first and second causes of action, removed to the United States District Court, Northern Division, Northern District. Plaintiff's motion to remand was denied

*This question was not presented or argued to the Court of Appeals except for one oblique reference in the Appellant's Petition for Rehearing.

after careful consideration by the District Court.* Thereafter, plaintiff was permitted to join a fourth cause of action based upon alleged violations by defendant Anheuser-Busch of the federal anti-trust laws. It would seem clear that after the amended pleading was allowed, all of the causes of action were properly before the court by reason of the pendant jurisdiction doctrine.

Plaintiff's first three causes of action were founded upon state law and sounded in wrongful refusal to deal, breach of contract and unfair competition, respectively. Since their determination presents no federal questions and since the petition does not allege that they were decided in conflict with applicable state law each and all of them seem wholly inappropriate as a ground for certiorari. Accordingly, we do not elaborate the first three causes of action factually here, but turn to the fourth cause of action, which, as has been suggested heretofore, was an afterthought spawned by the adverse decision on plaintiff's motion to remand.

With respect to the fourth cause of action, the proven facts, as contrasted with the elaborate allegations of the complaint, are relatively simple and altogether without significant conflict.

Plaintiff served from October 1, 1961 to May 1, 1963 as defendant Anheuser-Busch's wholesaler in San Joaquin County, California. Over that period, he sold Budweiser and Michelob premium beers along with Hamm's beer, brewed by Theo. Hamm Brewing Co., a popular-priced beer. In early 1963, defendant Anheuser-Busch decided to introduce Busch Bavarian, its popular priced beer, to the California market. Anheuser-Busch, through its Western Division Manager, Vice President John Flanigan, asked plaintiff to

*The unpublished Memorandum opinion of the court is reprinted as Appendix II to this brief.

take on the distribution of Busch Bavarian in San Joaquin County (RT 212-213; 346). Plaintiff demurred—he was unwilling to do so without the permission of the brewers of Hamm's beer (RT 217, 346). From February to April 1963, plaintiff sought permission to take on Busch Bavarian from the Hamm's people. But, like the lady in the proverbial song, they wouldn't say yes and they wouldn't say no (RT 348, 350). Faced with the resultant uncertainty* plaintiff decided not to undertake the distribution of Busch Bavarian beer and so advised Anheuser-Busch on or about April 4, 1963 (RT 360).

During the period of plaintiff's indecision, Anheuser-Busch endeavored to find other distributors in San Joaquin County who would be willing to take on Busch Bavarian beer (RT 227, 354-355). When no existing distributor indicated interest in pioneering this new product in the already highly competitive popular-priced beer market, Anheuser-Busch elected to deal with an inactive distributor, who was willing to undertake the distribution of Busch Bavarian provided that he also got Budweiser and Michelob (RT 688, 690-691). In the face of the economic exigencies of the situation† this arrangement was consummated and Anheuser-Busch ceased dealing with plaintiff.

Thus, Anheuser-Busch changed distributors in San Joaquin County in May 1963. In the process, competition in the sale of beer was intensified by the addition of one new popular-priced brand and one newly activated beer distributor in San Joaquin County, California. It is apparent from a cursory review of the admitted operative facts in

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*Whether his fears were real or fancied, plaintiff worried that he might lose the Hamm's line if he took on Busch Bavarian (RT 353-354).

†Plaintiff candidly testified that no one could make a profit in the Stockton [San Joaquin County] area handling Busch Bavarian alone (RT 354).

this case that they depict no anticompetitive consequences whatsoever. To the contrary, as the Court of Appeals noted in concluding its opinion in this case (Pet. App. ix):

> ". . . A course of conduct which thus increases rather than diminishes competition, benefiting rather than injuring the public, is not condemned under the Sherman or Clayton Acts."

ARGUMENT

There can be no real question about the propriety of the removal of this case to the District Court or the propriety of that court's order denying a remand. Reference to the clerk's transcript at page 14, lines 21-25 shows that the first cause of action (anti-trust) ran only against Anheuser-Busch; the second cause (contract) also charged only Anheuser-Busch (CT 23, lines 23-25) whereas the third count (unfair competition) charged "all defendants" (CT 27, lines 13-15). Since plaintiff was a resident of California and defendant Anheuser-Busch is a Missouri corporation with its principal place of business in St. Louis, Missouri, and the other jurisdictional requirements of the District Court were satisfied, that court had diversity jurisdiction. The cause was removable under 28 U.S.C. 1441(c) which provides in pertinent part:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein. . . ."

The case law on the subject is cited and analyzed in the court's Memorandum and Order denying remand, Appendix II hereof. And, finally, the question was not even raised in the court below.

With regard to the fourth cause of action, the allegations of wrongdoing never ripened into anti-trust violations because the requisite proof was not forthcoming. All that Plaintiff succeeded in showing was that Anheuser-Busch changed distributors in San Joaquin County under the prod of: 1) plaintiff's refusal to take on Busch Bavarian, and 2) economic necessity. The change actually increased, rather than diminished competition and was not an unreasonable restraint of trade. *Ace Beer Distributors, Inc. v. Kohn Inc.*, 318 F.2d 283, cert. den. 375 U.S. 922.

CONCLUSION

If the Court reaches a consideration of the petition on the merits, there is no basis in law for issuance of a writ. It is respectfully submitted that certiorari should be denied.

Dated: May 6, 1968.

CHARLES E. HANGER
Attorney for Respondent

(Appendices Follow)

Appendix I

(a) "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." (28 U.S.C. § 1441)

Appendix II

In the United States District Court for the Northern District of California, Northern Division

Civil No. 8672

William F. Scanlan,
Plaintiff,

vs.

Anheuser-Busch, Inc., a corporation; John Flanigan; George Elliott; George Newhouse; George Liokos; Richard O'Shanesy; Doe I; Doe II; Doe III; First Corporation, a corporation; and Second Corporation, a corporation,
Defendants.

MEMORANDUM AND ORDER

Presently before this Court is a motion filed by plaintiff to have this action remanded back to the Superior Court of the State of California, in and for the County of San Joaquin. In the alternative, plaintiff has moved (1) for a preliminary injunction, and (2) for leave to file a supplement to his complaint. By stipulation, however, decision on each of those motions has been stayed, pending determination of plaintiff's present motion to have this case remanded. The latter motions will not presently be considered.

Defendant Anheuser-Busch removed this action from the Superior Court of the State of California, in and for the County of San Joaquin, on June 12, 1963, the complaint having been filed in said Superior Court on June 3, 1963. The original complaint set forth three counts, alleging, respectively, causes of action for violation of federal and state anti-trust laws through refusal to deal (Count I), for breach of an oral contract of distributorship (Count II),

and for wrongful solicitation of plaintiff's customers (Count III). The only defendant named in Counts I and II was defendant Anheuser-Busch. Each of the individual named defendants was included within the allegations contained in Count III.

By the allegations of the petition for removal, plaintiff is a citizen and resident of the State of California, and defendant Anheuser-Busch is a Missouri corporation, with its principal place of business in St. Louis, Missouri. As to Counts I and II, therefore, it appears that there is complete diversity of citizenship between the parties (Title 28 U.S.C. § 1332), and that this is a proper basis for removal under the provisions of Title 28 U.S.C. § 1441(a).

In addition, however, included within the allegations of Count I, and repleaded by reference in Counts II and III, is language pertaining to the Federal Alcohol Administration Act (Title 27 U.S.C. § 201), and the Sherman and Clayton Anti-Trust Acts (Title 15 U.S.C. § 1 *et seq.*). It is contended by defendant Anheuser-Busch that reference to these statutes, and their presumed basis as support for plaintiff's alleged causes of action, constitutes sufficient ground to establish federal question jurisdiction in this Court (Title 28 U.S.C. §§ 1331 and 1441(b)). Such a contention is without merit, since removal jurisdiction is derivative. It is essential, upon removal, that the state court from which removal was effected have had jurisdiction over the case. If it did not, the district court cannot acquire derivative jurisdiction by reason of removal, even though there might have been original federal jurisdiction of the action if it had been filed in the district court in the first instance (*Venner v. Michigan Cent. R.R.*, 271 U.S. 127). In the instant case, both plaintiff and defendant Anheuser-Busch agree that the Superior Court in San Joaquin County could have had no jurisdiction of a federal anti-trust action under

either the Sherman Act (See: Title 15 U.S.C. § 4, and *Hand v. Kansas City Southern Ry. Co.*, 55 F.2d 712) or the Clayton Act (See: Title 15 U.S.C. § 9), or of an action under the Federal Alcohol Administration Act (See: Title 27 U.S.C. § 207, and *Strauss v. Berkshire*, 132 F.2d 530). In the absence of such state court jurisdiction under any of those statutes, said statutes cannot be used as a basis for removal of this action to this court, under the *Venner* rule (See, also, *A. J. Curtis & Co. v. D. W. Falls, Inc.*, 305 F.2d 811). Jurisdiction of this Court over the instant case must rest, if it exists at all, upon the diversity of citizenship between plaintiff and defendant Anheuser-Busch.

It appears that each of the named individual defendaants, against whom a cause of action is alleged in Count III, is a citizen and resident of the State of California. As to that count, therefore, diversity of citizenship is defeated. The crux of the instant motion thus comes down to the question of whether the provisions of Title 28 U.S.C. § 1441(c) are applicable to the instant case. That section provides as follows:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one of more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

This Court is thus concerned with the question of whether plaintiff's alleged cause of action in Count III, relating to the wrongful solicitation of customers, is a "separate and independent claim or cause of action."

The present test of "separate and independent claim or cause of action" was set forth in 1948, was considered by the United States Supreme Court in *American Fire & Cas-*

ualty Co. v. Finn, 341 U.S. 6, and was interpreted by that Court to involve a more restrictive basis for removal than the former test, "separable controversy." The Supreme Court held that,

> "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."

In determining what constitutes a "separate and independent claim or cause of action," the governing rule appears to be that federal law supplies the test as to what is a separate and independent claim, but state law may be looked to in determining what the nature of the claims are to which the test is to be applied (See: *Charles Dowd Box Co. v. Fireman's Fund Ins. Co.,* 303 F.2d 57; *Smith v. Southern Pacific Co.,* 187 F.2d 397; *White v. Baltic Conveyor Co.,* 209 F. Supp. 716; *Anderson v. Union Pac. R. Co.,* 200 F.Supp. 465; *Garroutte v. General Motors Corp.,* 179 F.Supp. 315; and *Shaver v. Arkansas-Best Freight System, Inc.,* 171 F.Supp. 754; but cf. *Kolb v. Prudential Ins. Co.,* 170 F.Supp. 97).

Plaintiff has placed great reliance upon Judge Carter's decision in *Guess v. Kellog Switchboard & Supply Company,* 143 F.Supp. 807. The *Guess* case involved allegations that the plaintiff had been wrongfully suspended as an employee by the corporate defendant, and that the individual defendants had wrongfully induced the corporation to take such action. The holding was to the effect that the individual defendants were properly joined, and that the plaintiff was making complaint of only one wrong, namely, his suspension from employment. Both the *Guess* case and the instant case involve a question of action plus a question of inducement to action. In *Guess,* however, the wrongful

act involved a suspension, and the inducement involved that particular wrongful act. In the instant case, however, the alleged wrongful act involves the breach of the distributorship agreement, whereas the inducement is not directed toward that breach, but rather is directed toward a solicitation of customers. These involve completely separate and distinct "wrongs," under California substantive law (*Buxbom v. Smith,* 23 Cal.2d 535). As such, they fulfill the "separate and independent claim or cause of action" test of § 1441(c) (See, also, *Allison v. American Airlines,* 112 F.Supp. 37).

Parenthetically, it might well be noted that the case of *Mayflower Industries v. Thor Corp.,* 184 F.2d 537, appears to indicate a contrary holding. That case, however, was decided prior to the construction of § 1441(c) in *American Fire & Casualty Co. v. Finn, supra,* and involved allegations of a conspiracy between the defendants which would connect the two separate causes of action. In the opinion of this Court, however, the reasoning of Judge McLaughlin, in dissent, indicates the proper construction of § 1441(c).

IT IS, THEREFORE, ORDERED that plaintiff's motion to remand the instant case to the Superior Court of the State of California, in and for the County of San Joaquin, be, and the same is, hereby denied. This case will be re-set on the motion of either party for consideration of plaintiff's motions for leave to amend his complaint and for a preliminary injunction.

Dated: August 9, 1963.

SHERRILL HALBERT

United States District Judge